REPORTS

OF

THE DECISIONS

IN THE

SUPREME COURT OF THE UNITED STATES.

FEBRUARY TERM, 1823.

[Constitutional Law.]

Green and Others v. Biddle.

The act of the State of Kentucky, of the 27th of February, 1797, concerning occupying claimants of land, whilst it was in force, was repugnant to the constitution of the United States, but it was repealed by a subsequent act of the 31st of January, 1812, to amend the said act; and the last mentioned act is also repugnant to the constitution of the United States, as being in violation of the compact between the States of Virginia and Kentucky, contained in the act of the legislature of Virginia, of the 18th of December, 1789, and incorporated into the constitution of Kentucky.

By the common law, the statute law of Virginia, the principles of equity, and the civil law, the claimant of lands who succeeds in his suit, is entitled to an account of mesne profits, received by the occupant from *some period* prior to the judgment of eviction, or decree.

At common law, whoever takes and holds possession of land, to which another has a better title, whether he be a *bonæ fidei* or a *malæ fidei* possessor, is liable to the true owner for all the rents and profits which he has received: but the disseisor, if he be a *bonæ fidei* occupant, may recoup the value of the meliorations made by him against the claim of damages.

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Equity allows an account of rents and profits in all cases, from the time of the title accrued, (provided it does not exceed six years,) unless under special circumstances, as where the defendant had no notice of the plaintiff's title, nor had the deeds in which the plaintiff's title appeared in his custody, or where there has been laches in the plaintiff in not asserting his title, or where his title appeared by deeds in a stranger's custody; in all which, and other similar cases, the account is confined to the time of filing the bill.

By the civil law, the exemption of the occupant from an account for rents and profits is strictly confined to the case of a *bonæ fidei* possessor, who not only *supposes* himself to be the true owner of the land, but who is ignorant that his title is contested by some other person claiming a better right. And such a possessor is entitled only to the fruits or profits which were produced by his own industry, and not even to those, unless they were consumed.

Distinctions between these rules of the civil and common law, and of the Court of Chancery, and the provisions of the acts of Kentucky, concerning occupying claimants of land.

The invalidity of a State law, as impairing the obligation of contracts, does not depend upon the extent of the change which the law effects in the contract.

Any deviation from its terms, by postponing or accelerating the period of its performance, imposing conditions not expressed in the contract, or dispensing with the performance of those which are expressed, however minute or apparently immaterial in their effect upon the contract, impairs its obligation.

The compact of 1789, between Virginia and Kentucky, was valid under that provision of the constitution, which declares, that "no State shall, without the consent of Congress, enter into any agreement or compact with another State, or with a foreign power:"—no particular mode, in which that consent must be given, having been prescribed by the constitution; and Congress having consented to the admission of Kentucky into the Union, as a sovereign State, upon the conditions mentioned in the compact.

The compact is not invalid upon the ground of its surrendering rights of sovereignty, which are unalienable.

This Court has authority to declare a State law unconstitutional, upon the ground of its impairing the obligation of a compact between different States of the Union.

The prohibition of the constitution embraces all contracts, executed or executory, between private individuals, or a State and individuals, or corporations, or between the States themselves.

THIS was a writ of right, brought in the Circuit

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Court of Kentucky, by the demandants, Green and others, who were the heirs of John Green, deceased, against the tenant, Richard Biddle, to recover certain lands in the State of Kentucky, in his possession. The cause was brought before this Court upon a division of opinion of the judges of the Court below, on the following questions:

1. Whether the acts of the legislature of the State of Kentucky, of the 27th of February, 1797, and of the 31st of January, 1812, concerning occupying claimants of land, are constitutional or not; the demandants and the tenant both claiming title to the land in controversy under patents from the State of Virginia, prior to the erection of the district of Kentucky into a State?

2. Whether the question of improvements ought to be settled under the above act of 1797, the suit having been brought before the passage of the act of 1812, although judgment for the demandant was not rendered until after the passage of the last mentioned act?

The ground, upon which the unconstitutionality of the above acts was asserted, was, that they impaired the obligation of the compact between the States of Virginia and Kentucky, contained in an act of the legislature of the former State, passed the 18th of December, 1789, which declares, "that all private rights, and interests of lands within the said District" (of Kentucky) "derived from the laws of Virginia prior to such separation, shall remain valid and secure under the laws of the proposed State, and shall be determined by the laws now existing in this State." This compact was

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ratified by the convention which framed the constitution of Kentucky, and incorporated into that constitution as one of its fundamental articles.

The most material provisions in the act of 1797, which were supposed to impair the obligation of the compact of 1789, and therefore void, are the following:

1. It provides that the occupant of land, from which he is evicted by better title, shall, in all cases, be excused from the payment of rents and profits accrued prior to actual notice of the adverse title, provided his possession in its inception was peaceable, and he shows a plain and connected title, in law or equity, deduced from some record.

2. That the successful claimant is liable to a judgment against him for all valuable and lasting improvements made on the land prior to actual notice of the adverse title, after deducting from the amount the damages which the land has sustained by waste or deterioration of the soil by cultivation.

3. As to improvements made, and rents and profits accrued, *after notice of the adverse title*, the amount of the one shall be deducted from that of the other, and the balance added to, or subtracted from, the estimated value of the improvements made before such notice, as the nature of the case may require. But it is *provided*, by a subsequent clause, that in no case shall the successful claimant be obliged to pay for improvements made *after notice*, more than what is equal to the rents and profits.

4. If the improvements exceed the value of the

land in its unimproved state, the claimant shall be allowed the privilege of conveying the land to the occupant, and receiving in return the assessed value of it without the improvements, and thus to protect himself against a judgment and execution for the value of the improvements. If he declines doing this, he shall recover possession of his land, but shall then pay the estimated value of the improvements, and also lose the rents and profits accrued before notice of the claim. But to entitle him to claim the value of the land as above mentioned, he must give bond and security to warrant the title.

The act of 1812 contains the following provisions:

1. That the peaceable occupant of land, who supposes it to belong to him in virtue of some legal or equitable title, founded on a record, shall be paid by the successful claimant for his improvements.

2. That the claimant may avoid the payment of the value of such improvements, at his election, by relinquishing the land to the occupant, and be paid its estimated value in its unimproved state.

Thus, if the claimant elect to pay for the value of the improvements, he is to give bond and security to pay the same, with interest, at different instalments. If he fail to do this, or if the value of the improvements exceeds three fourths of the unimproved land, an election is given to the occupant to have a judgment entered against the claimant for the assessed value of the improvements, or to take the land, giving bond and security to

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But if the claimant is not willing to pay for the improvements, and they should exceed three fourths of the value of the unimproved land, the occupant is *obliged* to give bond and security to pay the assessed value of the land, with interest; which if he fail to do, judgment is to be entered against him for such value, the claimant releasing his right to the land, and giving bond and security to warrant the title.

If the value of the improvements does not exceed three fourths of the value of the unimproved land, then the occupant is not *bound* (as he is in the former case) to give bond and security to pay the value of the land; but he may claim a judgment for the value of his improvements; or take the land, giving bond and security, as before mentioned, to pay the estimated value of the land.

3. The exemption of the occupant from the payment of the rents and profits, extends to all such as accrued during his occupancy, before judgment rendered against him in the first instance: but such as accrue after such judgment, for a term not exceeding five years, as also waste and damage, committed by the occupant *after suit brought*, are to be deducted from the value of the improvements, or the Court may render judgment for them against the occupant.

4. The amount of such rents and profits, damages and waste, and also the value of the improvements, and of the land without the improvements,

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are to be ascertained by commissioners, to be appointed by the Court, and who act under oath.

The cause was argued at February term, 1821, by Mr. *Talbot* and Mr. *B. Hardin*, for the demandants, no counsel appearing for the tenant.

Feb. 16*th*, 1821.

They contended, that the acts of the State legislature, in question, were inconsistent with the true meaning and spirit of the compact of 1789, their avowed scope and object being to change the existing condition of the parties litigant, respecting the security of private rights and interests of land, within the territory of Kentucky, derived from the laws of Virginia prior to the separation. These acts do not merely attempt to alter the mode of prosecuting remedies for the recovery of rights and interests thus derived, (which possibly they might do,) but essentially affect the right and interest in the land recovered. They seek to accomplish this, by diminishing or destroying the value of the interest in controversy, by compelling the successful claimant and rightful owner of the land, to pay the one half, and, in some instances, the entire value of the land recovered; not the actual value of the amelioration of the land, while held by the occupying claimant, but the expense and labour of making the improvements.

Both the acts are framed in the same spirit and with the same object; both are adapted to change the relative condition of the parties, to the great prejudice of the rightful owner. The principal object in view in the act of 1797, was to exempt the occupant from his liability for waste committed by him, or rents and profits received by him, prior

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to the commencement of the suit for the land, although he may, when he first took possession, have had full notice of the plaintiff's title, and consequently be a *malæ fidei* possessor. The act of 1812, purporting to be in amendment of the former act, with the avowed purpose of still further protecting the interests of the occupant, completely exempts him from all liability for waste committed, or for rents and profits received, before the judgment or decree in the suit. In no possible case can the right owner recover more than five years' rent, although the litigation may, and frequently does, last a much longer period; whilst he is subjected to the payment for all improvements made at any period of the suit, down to the time of final judgment, to be set off against the amount of his claim for rents and profits. abridged and limited as it is by this act.

The object of the compact was plainly to secure to all persons deriving titles under the then existing laws of Virginia, the entire and perpetual enjoyment of their rights of property, against any future legislative acts of the State of Kentucky, which it was foreseen might be passed under the influence of local feelings and interests. The compact did not merely intend to secure the determination of the titles to land by those laws, but also the actual enjoyment of the rights and interests thus established. It did not intend to give the true owner a right to recover, and then to couple that right with such onerous conditions as to make it worthless: to compel him to repurchase his own land, by indemnifying the occupant, (often

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a *malæ fidei* possessor,) not for his expenses and labour in improving the value, but frequently in the deterioration of the land, to the great injury of the owner. The "rights and interests," of which the compact speaks, were not only to be rendered valid and secure, by preserving the modes and forms of proceeding for the assertion of those rights, but by preserving the existing provisions of law and rules of equity, under which the practical object and end of a suit are to be attained: the possession and enjoyment of the land, unburthened with any unjust conditions extorted by fraud and violence. Its letter and spirit both, forbid the interpretation, by which laws are made to exempt the occupant from his liability to account for the mesne profits, upon the pre-existing principles of law and equity; and by which that exemption is extended to every period of time, from his first taking possession down to his being actually ejected, without any regard to the circumstances by which the original character of his possession may be entirely changed by notice of a better title, of which he might have been originally ignorant. And is not the loss or injury resulting from the diminution of the value or amount recovered and actually received by the true owner, by taking one half the value of the land to pay for the estimated value or cost of the pretended ameliorations, of the same extent, as if, upon a recovery of an entire tract of land, the judgment was to be declared satisfied by delivering possession of a moiety only? Do then *the rights and interests of land*, as they were derived from the laws of Virginia, remain *valid*

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and secure, under these acts of the legislature of Kentucky? If by validity and security be meant injury, forfeiture, and destruction, then indeed the terms of the compact are amply satisfied. But if an entire and complete protection of these rights and interests, as to their value, use, and enjoyment by the true owner, was intended; then the laws in question, (the avowed object and intention, as well as the practical operation of which, is to better the condition of the occupant at the expense of the true and lawful owner, by compelling the latter, after he has recovered a formal judgment, establishing the validity of his title, to purchase the execution of that judgment by the performance of conditions which the laws existing in 1789 did not require,) are a gross violation of the compact, and consequently unconstitutional and void. If, in short, that which cannot be done directly, ought not to be permitted to be done indirectly and circuitously, the legislature of Kentucky were no more authorized to enact rules or regulations, by the operation of which the land recovered by the real owner is encumbered with a lien, to the amount of half, or any other proportion of its value, for the benefit of the occupant, and to indemnify him for his fault or misfortune in claiming under a defective title, than they would have been to produce the same effect, and to equalize the condition of the parties, by dividing the specific land between them.

March 5th, 1821.

Mr. Justice STORY delivered the opinion of the Court.

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The first question certified from the Circuit Court of Kentucky, in this cause, is, whether the acts of Kentucky, of the 27th of February, 1797, and of the 31st of January, 1812, concerning occupying claimants of land, are unconstitutional?

This question depends principally upon the construction of the seventh article of the compact made between Virginia and Kentucky, upon the separation of the latter from the former State, that compact being a part of the constitution of Kentucky. The seventh article declares, "that all private rights and interests of lands, within the said District, derived from the laws of Virginia, shall remain valid and secure under the laws of the proposed State, and shall be determined by the laws now existing in this State."

We should have been glad, in the consideration of this subject, to have had the benefit of an argument on behalf of the tenant; but as no counsel has appeared for him, and the cause has been for some time before the Court, it is necessary to pronounce the decision, which, upon deliberation, we have formed.

As far as we can understand the construction of the seventh article of the compact contended for by those who assert the constitutionality of the laws in question, it is, that it was intended to secure to claimants of lands their rights and interests therein, by preserving a determination of their titles by the laws under which they were acquired. If this be the true and only import of the article, it is a mere nullity; for, by the general principles of law, and from the necessity of the case, titles to

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real estate can be determined only by the laws of the State under which they are acquired. Titles to land cannot be acquired or transferred in any other mode than that prescribed by the laws of the territory where it is situate. Every government has, and from the nature of sovereignty must have, the exclusive right of regulating the descent, distribution, and grants of the domain within its own boundaries; and this right must remain, until it yields it up by compact or conquest. When once a title to lands is asserted under the laws of a territory, the validity of that title can be judged of by no other rule than those laws furnish, in which it had its origin; for no title can be acquired contrary to those laws: and a title good by those laws cannot be disregarded but by a departure from the first principles of justice. If the article meant, therefore, what has been supposed, it meant only to provide for the affirmation of that which is the universal rule in the Courts of civilized nations, professing to be governed by the dictates of law.

Besides, the *titles* to lands can, in no just sense, in compacts of this sort, be supposed to be separated from the *rights and interests* in those lands. It would be almost a mockery to suppose that Virginia could feel any solicitude as to the recognition of the abstract validity of titles, when they would draw after them no beneficial enjoyment of the property. Of what value is that title which communicates no right or interest in the land itself? or how can that be said to be any title at all which cannot be asserted in a Court of justice

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by the owner, to defend or obtain possession of his property?

The language of the seventh article cannot, in our judgment, be so construed. The word title does not occur in it. It declares, in the most explicit terms, that *all private rights and interests* of lands, derived from the laws of Virginia, shall remain valid and secure under the laws of Kentucky, and shall be determined by the laws then existing in Virginia. It plainly imports, therefore, that these rights and interests, as to their nature and extent, shall be exclusively determined by the laws of Virginia, and that their security and validity shall not be in any way impaired by the laws of Kentucky. Whatever law, therefore, of Kentucky, does narrow these rights and diminish these interests, is a violation of the compact, and is consequently unconstitutional.

The only question, therefore, is, whether the acts of 1797 and 1812 have this effect. It is undeniable that no acts of a similar character were in existence in Virginia at the time when the compact was made, and therefore no aid can be derived from the actual legislation of Virginia to support them. The act of 1797 provides, that persons evicted from lands to which they can show a plain and connected title in law or equity, without actual notice of an adverse title, shall be exempt from all suits for rents or profits prior to actual notice of such adverse title. It also provides, that commissioners shall be appointed by the Court pronouncing the judgment of eviction, to assess the value of all lasting and valuable improvements

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made on the land, prior to such notice, and they are to return the assessment thereof, after subtracting all damages to the land by waste, &c. to the Court; and judgment is to be entered for the assessment, in favour of the person evicted, if the balance be for him, against the successful party, upon which judgment execution shall immediately issue, unless such party shall give bond for the payment of the same, with five per cent. interest, in twelve months from the date thereof. And if the balance be in favour of the successful party, a like judgment and proceedings are to be had in his favour. The act further provides, that the commissioners shall also estimate the value of the lands, exclusive of the improvements; and if the value of the improvements shall exceed the value of the lands, the successful claimant may transfer his title to the other party, and have a judgment in his favour against such party for such estimated value of the lands, &c. There are other provisions not material to be stated.

The act of the 31st of January, 1812, provides, that if any person hath seated or improved, or shall thereafter seat or improve any lands, supposing them to be his own by reason of a claim in law or equity, the foundation of such claim being of public record, but which lands shall be proved to belong to another, the charge and value of such seating and improving, shall be paid by the right owner to such seater or improver, or his assignee, or occupant so claiming. If the right owner is not willing to disburse so much, an estimate is to be made of the value of the lands, exclusive of the seating

and improvements; and also of the value of such seating and improvements. If the value of the seating and improving exceeds three fourths of the value of the lands if unimproved, then the valuation of the land is to be paid by the seater or improver; if not exceeding three fourths, then the valuation of the seating and improving is to be paid by the right owner of the land. The act further provides, that no action shall be maintained for rents or profits against the occupier, for any time elapsed before the judgment or decree in the suit. The act then provides for the appointment of commissioners to make the valuations; and for the giving of bonds, &c. for the amount of the valuations, by the party who is to pay the same; and in default thereof, provides that judgment shall be given against the party for the amount; or if the right owner fails to give bond, &c. the other party may, at his election, give bond, &c. and *take the land.* And the act then proceeds to declare, that the occupant shall not be evicted or dispossessed by a writ of possession, until the report of the commissioners is made, and judgment rendered, or bonds executed in pursuance of the act.

From this summary of the principal provisions of the acts of 1797 and 1812, it is apparent that they materially impair the rights and interests of the rightful owner in the land itself. They are parts of a system, the object of which is to compel the rightful owner to relinquish his lands, or pay for all lasting improvements made upon them, without his consent or default; and in many cases

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those improvements may greatly exceed the original cost and value of the lands in his hands. No judgment can be executed, and no possession obtained for the lands, unless upon the terms of complying with the requisitions of the acts. They, therefore, in effect, create a direct and permanent lien upon the lands for the value of all lasting improvements made upon them; without the payment of which, the possession and enjoyment of the lands cannot be acquired. It requires no reasoning to show, that such laws necessarily diminish the beneficial interests of the rightful owner in the lands. Under the laws of Virginia no such burthen was imposed on the owner. He had a right to sue for, recover, and enjoy them, without any such deductions or payments.

The seventh article of the compact meant to secure all private rights and interests derived from the laws of Virginia, as valid and secure under the laws of Kentucky, as they were under the then existing laws of Virginia. To make those rights and interests so valid and secure, it is essential to preserve the beneficial proprietary interest of the rightful owner, in the same state in which they were, by the laws of Virginia, at the time of the separation. If the legislature of Kentucky had declared by law, that no person should recover lands in this predicament, unless upon payment, by the owner, of a moiety, or of the whole of their value, it would be obvious that the former rights and interests of the owner would be completely extinguished *pro tanto*. If it had further provided, that he should be compelled to sell the same at

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one half or one third of their value, or compelled to sell, without his own consent, at a price to be fixed by others, it would hardly be doubted that such laws were a violation of the compact. These cases may seem strong; but they differ not in the *nature*, but in the *degree* only of the wrong inflicted on the innocent owner. He is no more bound by the laws of Virginia to pay for improvements, which he has not authorized, which he may not want, or which he may deem useless, than he is to pay a sum to a stranger for the liberty of possessing and using his own property, according to the rights and interests secured to him by those laws. It is no answer, that the acts of Kentucky, now in question, are regulations of the remedy, and not of the right to lands. If those acts so change the nature and extent of existing remedies, as materially to impair the rights and interests of the owner, they are just as much a violation of the compact, as if they directly overturned his rights and interests.

It is the unanimous opinion of the Court, that the acts of 1797 and 1812, are a violation of the seventh article of the compact with Virginia, and therefore are unconstitutional. This opinion renders it unnecessary to give any opinion on the second question certified to us from the Circuit Court.[a]

Mr. *Clay*, (as *amicus curiæ*,) moved for a rehearing in the cause, upon the ground that it in-

March 12*th*, 1821.

a Present Mr. Chief Justice MARSHALL, and Justices JOHNSON, LIVINGSTON, TODD, DUVALL, and STORY.

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volved the rights and claims of numerous occupants of land in Kentucky, who had been allowed by the laws of that State, in consequence of the confusion of the land titles, arising out of the vicious system of location under the land law of Virginia, an indemnity for their expenses and labour bestowed upon lands of which they had been the *bonæ fidei* possessors and improvers, and which were reclaimed by the true owners. He stated, that the rights and interests of those claimants would be irrevocably determined by this decision of the Court, the tenant in the present cause having permitted it to be brought to a hearing without appearing by his counsel, and without any argument on that side of the question. He therefore moved, that the certificate to the Circuit Court, of the opinion of this Court upon the questions stated, should be withheld, and the cause continued to the next term for argument.

Motion granted.

March 8th, 9th, 10th, and 11th, 1822.

Mr. *Montgomery*, for the demandant, made three points:

1st. That this Court is invested with the power of questioning the validity of the legislative acts of Kentucky, under which the tenant claims, both by the national constitution and the State constitution of Kentucky.

2d. That the acts of Kentucky, so far as they respect the present controversy, are null and void.

3d. That the act of 1812 cannot be applied to the case, consistently with the provisions of the constitution of Kentucky and of the United States.

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1. He denied that this Court was bound by the exposition, given by the State Courts, to that part of the State constitution now drawn in question, even in a case of which the national judiciary had cognizance merely from the character of the parties litigant, as being citizens of different States: and still less where the subject matter in controversy was connected with that provision of the United States' constitution, which secured the inviolability of contracts against State legislative acts. Such a doctrine would furnish an effectual recipe for sanctioning injustice by the forms of law, by giving to local decisions a much more extensive effect than had ever been before attributed to them. Unquestionably, the adjudications of the State Courts, where they have become a settled rule of property, are in general to be regarded as conclusive evidence of the local law; but where the interpretation of the fundamental law of the State is involved, and especially where that interpretation depends upon the constitution of the Union, (which is the supreme law,) the State Courts must necessarily be controlled by the superintending authority of this Court. This depends upon a principle peculiar to our constitutions, and which distinguishes them from every free and limited government which has been hitherto known in the world. In England, the legislative power of Parliament is not only supreme, but it is absolute, and (so far as depends upon written rules) despotic and uncontrollable by any other authority whatever.[a] But various

[a] 1 *Bl. Comm.* 160—162.

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limitations upon the legislative power are contained in the constitution of Kentucky; and that of the United States contains other restraints upon the legislative power of the several States, and gives to the national judiciary the authority of enforcing them, especially in controversies arising between citizens of different States, as the present case does.

2. He stated that the second point would be maintained by establishing two propositions. First, that the legislative acts in question are repugnant to the terms of the compact of 1789, between the States of Virginia and Kentucky, which is made a fundamental article of the constitution of Kentucky. Second, that the acts are repugnant to that constitution, in depriving the demandant of the trial by jury.

The terms used in the compact, "rights and interests of land," import something more than a mere formal title. A *right* of property necessarily includes the right to recover the possession, to enter, to enjoy the rents and profits, and to continue to possess undisturbed by others.[a] He who has a right to land, and is in possession, has a right to be maintained in that possession, and in the use of the land and its fruits; and he who has a right to land, but is out of possession, has a right to recover the possession or seisin. These are the qualities and incidents of a right to land at common law; none of which had been taken away by the statute at the time the compact was made.

[a] *Jac. Law Dic.* tit. *Right*, 536. *Co. Litt.* s. 445. 447. 8 *Rep. Altham's* case. *Plowd.* 478.

As to the word "*interest*," it might have been inserted *ex abundanti cautela*, to protect rights which, at the time of the compact, were not yet carried into grant. The term *interest*, as applied to land, according to many authorities, may be something different from a right to land in fee simple; yet it cannot be doubted, that he who has a fee simple has an interest in the land. A term for years is an *interest*, and so is the right both of mortgagor and mortgagee. It is then quite clear, that the term *rights and interests of land* means a great deal more than the mere use and possession of the evidence of title.

What, then, were the pre-existing rules of law and equity, with reference to which the compact of 1789 is to be construed? By the common law then in force in Virginia, and by the statute of 1785, the remedy by writ of right was given to him who had the fee; and if the demandant recovered his seisin, he might also recover damages, to be assessed by the recognitors of assize, for the tenant's withholding possession of the tenement demanded.[a] In cases where an ejectment was brought, the party might have his separate action for the mesne profits, which could only be restrained in its operation by the statute of limitations of five years. As to the system of positive equity, which had been established at the period referred to, and which it was supposed was not infringed by the legislative acts now in question, it will be found that the cases where the Court of Chancery

[a] 1 *Virg. Rev. Cod.* 33.

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has interfered, may be reduced to the following classes: (1) Where the party came into equity in order to disembarrass his legal title of difficulties resulting from the defect of evidence at law, and also prayed a decree for the mesne profits. (2.) Where the title was merely equitable, Chancery has decreed both as to the title and for the mesne profits. (3.) So also in cases of dower, the title as well as the mesne profits has been decreed. (4.) In cases where infants are interested, the title and mesne profits have both been determined. In all these cases, the plaintiff sought relief, as well touching the title, as for an account of the mesne profits; and the claimant has therefore been allowed for valuable and lasting improvements, *bona fide* made. In the first and second classes, the account for mesne profit has been taken from the time of bringing the suit only, because the plaintiff had improperly lain by with his title. But where that fact does not appear, the account is always carried back to the time the title accrued.[a] There is no case where a bill has been filed by the occupant, claiming the value of his improvements against the right owner. The cases where it has been allowed, are where the title and an account of rents and profits constituted the matter of the complainant's bill, and where the defendant resisted the relief sought, by setting up some colour of title in himself, with a

a 2 *Vern.* 724. 1 *Atk.* 524—526. 2 *Atk.* 83. 283. 3 *Atk.* 130—134. 2 *P. Wms.* 645, 646. 1 *Madd. Chanc.* 73—75. 1 *Wash.* 329.

claim for the improvements. This went upon the favourite maxim of the Court of Chancery, that he who will have equity must do equity. But though no case, where the occupant was the plaintiff, is to be found before 1789, yet it is admitted there are certain maxims and principles of equity, which, combined with the peculiar state of land titles in Kentucky, would authorize a Court of equity to relieve. Yet it is quite evident, that a party coming with his bill for relief, after a recovery had against him at law, must have stood upon a very different ground than the complainants in the cases above referred to. His application must have been to the extraordinary powers of the Court; he must have come in under the rule, that he who will have equity must do equity; he would not have been permitted to gain by the loss of the other party.[a] Upon a bill brought after a recovery in a real action, the account would have been carried back to the time of his first taking possession: complete equity would have been done by making a full estimate of the value of the rents and waste on one side, and of the improvements on the other; the want of notice of the defendant's title could not have been considered as important, since he would stand upon his judgment at law: but the decree would be for the balance of the account thus taken. After a recovery of mesne profits, in the action of tres-

a Locupletiorem neminem fieri cum alterius detrimento et injuria jure naturæ æquum est. *L. Jure Naturæ*, 206. *De Div. Reg. Jur. Antiq.*

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pass, following a recovery in ejectment, if the occupant had not pleaded the statute of limitations, he might have brought his bill, and the matter would have been adjusted in the same mode; but if he had pleaded the statute, and thus deprived the true owner of a part of his indemnity, he could not stand before the Court as a party willing to do equity, and consequently could not have equity. But even supposing that a bill would be retained in such a case, most certainly the same rule of limitations which deprived the proprietor of a part of his damages, would also be applied to the improvements made before the time of limitation. Admitting, too, that with respect to questions between the owner of the title as complainant, claiming relief, as well touching the title as for the rents and profits, and the other party, all the cases cannot be reconciled, yet there is a very decided preponderance in favour of the doctrine now maintained; and with respect to a naked claim for improvements, there is no contradiction whatever.

As to the terms "*valid and secure,*" which are used in the compact, with reference to the rights and interests of land derived from the laws of Virginia, they must import the permanent validity and security of whatever is included in, or incident to, the complete enjoyment of those rights and interests. This validity and security is impaired by the acts of the State legislature now in question. By the common law, connected with the statute of Virginia, before cited, the demandant, in a writ of right, was entitled to recover,

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together with his seisin, such damages as the jury might think him entitled to, for the detention of the land, and for the waste committed upon it, extending back to the time when the occupant entered upon the land. But by the act of 1797, s. 1, he is to recover no damages for the use of the land before actual notice, nor even subsequent to that notice, unless the suit is brought within a year. By the third section of the act of 1812, his damages for the detention are not to commence until the final judgment or decree in the Court of original jurisdiction. Under the first act, his right to damages is greatly diminished; under the second, it is almost annihilated. But suppose the respective rights of the parties are tested by the settled doctrines of positive equity; the tenant, in the present case, seeking equity from a party who had a clear legal right, would have been compelled to do complete equity. He would have received an equitable allowance for his improvements, if *bona fide* made; but the judgment of the demandant would not have been disturbed; the value of the improvements would have been compared with the amount of his damages, and a decree rendered according to the result of that comparison. In the case of a recovery by ejectment, followed by the action of trespass for mesne profits, which was the undoubted right of the owner of the land, as the law stood in 1789, the right of the plaintiff is diminished by the acts now in question. Under the old law, he could not be restricted from inquiring into the damages sustained, from the time the defendant entered upon

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the land down to the time of suit brought, unless the defendant pleaded the statute of limitations. But if the occupant insisted on that defence, he could have no remedy in equity. The act of 1812 also makes the giving a bond for the value of the improvements a condition to the recovery of possession, thus depriving the true owner of his pre-existent absolute right to the appropriate writ of execution.

It is clear, then, that the rights of the proprietor of the land are impaired by the statutes in question; they are neither determined by the same laws, nor by the same principles of equity incorporated into new laws.

Nor can these statutes be supported on the principles of abstract justice. It is not only a maxim of the Court of Chancery, but of every wise legislator, that equality is equity. So, also, one ought not to gain by the loss of another, who was in no fault. From these two maxims, the corollary may be drawn, that where the respective capitals of two individuals are equal, and their occupations, skill, and industry are the same, their condition in the social state, (so far as it depends upon legislative regulations,) ought to be precisely the same. Not that one may not benefit by turns of good fortune, without sharing his gains with the other; but that the law should not take from the one, to give to the other, rendering the one richer to make the other poorer, without some fault of the latter. Here the counsel illustrated the application of these principles, by putting a variety of cases which might occur under the

statutes, to show the extreme injustice and inequality of their operation. 1823. Green v. Biddle.

Nor does the fourth article of the compact, of 1789, warrant the passage of the acts under consideration. It merely gives to Kentucky the power of requiring lands to be improved and cultivated after six years. That this article does not apply to the present case may be shown by several considerations: (1.) The acts in question do not, by their terms, purport to be in execution of such a power. (2.) A power to require the owners of land to improve and cultivate for the general welfare, is one thing; and a power to take away the property of one citizen and give it to another, is a very different thing. (3.) A law requiring improvement and cultivation, and declaring a forfeiture for non-compliance, would only be applied to unoccupied lands; whereas the lands to which alone the acts are applied are actually improved and cultivated. The true owner is prevented by the acts of him who has usurped the possession from personal compliance.

It may be contended, that there are certain ancient statutes of Virginia, recognising the same obnoxious principles with the recent acts of Kentucky. But the only statute at all partaking of this character was that (called) of the 13th of Charles II., but in fact passed immediately after the restoration. This statute was entirely retrospective in its operation, and was intended to apply to a peculiar state of things existing during the civil wars and the Commonwealth, as distinctly appears, both by the preamble and the enacting

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clauses. It contained, however, no provision for depriving the true owner of the rents, &c. and was actually repealed in 1748.

As to the second particular proposition, under this general head, the constitution of Kentucky expressly declares, (art. 10. s. 6.) that " The ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate." The law of Virginia prescribed this mode of trial as to writs of right with all its details, and amongst others, that the damages of the demandant for the detention of the land should be assessed by the jury. An arbitrary tribunal of commissioners is substituted for this ancient mode of trial, by the acts, the validity of which is now drawn in question. Thus is not only the amount of damages to which the demandant was entitled, under the old law, diminished to a pittance, but even that is to be liquidated by a tribunal far more unfavourable to him than a jury.

3. The third general point would follow as a corollary from the proof of the two following propositions, or either of them : (1.) That the act of 1812 is repugnant both to the United States' constitution and that of Kentucky, as being retrospective in its operation upon vested rights, and as impairing the obligation of contracts. (2.) That it is repugnant to the constitution of Kentucky, in determining, by the legislative department, a matter which is exclusively cognizable by the judicial.

And first : the State constitution provides, art. 10. s. 18, that " No *ex post facto* law, nor law

impairing contracts, shall be made;" and the national constitution declares, art. 1. s. 13. that "No State shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." The terms of the prohibition are very similar, and the substance is absolutely the same. In the case at bar, the injury to the demandant was committed long before the passage of the act of 1812, which has interposed and violently deprived him of his remedy, even *pendente lite*. Considering the two prohibitions against *ex post facto* laws, and against laws impairing the obligation of contracts, together, they will be found to afford a complete protection to vested rights of property, and to apply precisely to the present case. All rights of action are founded either upon contracts or upon torts; they are either *ex contractu* or *ex delictu*. The framers of our constitutions, by the prohibitions against impairing the obligation of contracts, intended to protect all rights dependent upon contract from being diminished or destroyed; and they could not certainly have intended to leave injuries to property arising *ex delictu* wholly unredressed, or to leave the remedy to the caprice of the State legislatures. Doubtless, the more generally received opinion is, that this prohibition of *ex post facto* laws is to be restricted to criminal matters. But there are great authorities to the contrary. The commentator on the laws of England, in laying down the maxim of political philosophy, that *ex post facto* laws ought not to be passed, does indeed illustrate his position by a criminal case: and probably some have been mis-

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led, by taking the example for the rule.[a] Dr. Paley, however, lays down the rule without any qualification whatever.[b]

But supposing this first proposition to be questionable, there certainly can be no doubt as to the second. By the constitution of Kentucky, it is declared, that "The powers of government shall be divided into three distinct departments, and each of them be confided to a separate body of magistracy, to wit: those which are legislative to one; those which are executive, to another; and those which are judicial, to another." And by the second section of the same article, that "No person, or collection of persons, shall exercise any power properly belonging to either of the others: excepting in the instances hereinafter expressly directed or permitted." Now it cannot be denied, that a particular controversy, arising out of facts, which, by an existing law, give the parties a right to certain remedies in the Courts, is a matter exclusively of judicial cognizance. But here the legislative department has adjudicated upon it by interfering with these remedies, after a *lis pendens*, so as to take away the property of one and give it to another party. It is an adjudication discharging the tenant from a just claim which the demandant had against him under the former law, without any equivalent or indemnity to the latter. That this adjudication has been clothed with the forms of public and general legislation, and includes every case of the same class, can make no

a 1 *Bl. Comm.* 46. *b* *Paley's Mor. and Pol. Phil.* 444.

difference. This is an example of that very sort of legislation which Dr. Paley reprobates, and calls *double;* it being the exercise both of judicial and legislative power. Such legislative acts do not discriminate between diffe'nt cases, according to their peculiar circumstances, as the judicial authority would do. Thus, the act of 1812 confounds together the case of the person lying in wait with his title, to take an unfair advantage of the compact, and that of the rightful owner, who has constantly and openly pursued his claim; cases of infancy and of full age; of fair and fraudulent settlement: in short, all circumstances and qualities are indistinguishably blended in one sweeping act of retrospective injustice.

Mr. *Bibb,* contra, contended, that the substantial effect of the acts of 1797 and 1812, went merely to allow the grantee from the Commonwealth, who, under faith in his grant, has made valuable and lasting improvements, the amount of those improvements; and to exempt him from accounting for rents and profits, down to the time when he begins to be a *malæ fidei* possessor by resisting the better title of the true owner. That the acts did not apply even to cases of disputed boundaries, but only to cases of conflicting titles; nor to cases of fraud, or of lands previously cultivated and improved. He entered into a detail of the provisions of the laws, of the practice under them, and of the exposition they had received from the Courts; and contended,

1st. That the principle of the act of 1812, is a

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principle of natural equity and justice, as to permanent improvements by a *bonæ fidei* possessor.

2d. That the principle of postponing the account of rents and profits, is the true Chancery rule, and such as is familiarly applied in the practice of Courts of equity.

3d. That the laws are not repugnant to the compact of 1789.

1. The circumstances under which the country, where this momentous question arises, was settled, are to be considered. The manner in which it was colonized, and in which the titles to land were first acquired, and the consequent confusion of conflicting claims and litigation, are, unfortunately, but too well known to the Court. Under these difficult circumstances, all that the local legislature has done, is to assert the principle of natural justice and artificial equity, that he who takes possession of vacant lands, under a *prima facie* legal title, and makes valuable and lasting improvements, shall be considered as a *bonæ fidei* possessor. Such is the well established rule of the Court of Chancery, as to improvements which must pass with the freehold to the party asserting his paramount title. It is applied, where a vendee, under an agreement for a sale, takes possession: so, also, where a mortgagee is in possession, the Court never permits a redemption without paying for permanent improvements. If, then, the party has a right, in similar cases, to an indemnity, is it any objection that the statute has defined a rule, declaring what requisites shall be indispen-

sable? What better evidence of *bona fides* can there be than a grant under the great seal?

There is a great variety of claims, consisting of different grades or classes, complicating the titles to lands in Kentucky, and depending not merely on legal doubts, but on questions of evidence of great difficulty.[a] What is the opposing claim, which is of such validity as, *prima facie*, to convert the occupant into a *malæ fidei* possessor? The local tribunals have laid down the only safe practical rule, which is, that the positive decision of a Court of record shall alone be sufficient. All grants are by record, and the patent can only be repealed by matter of record. There must be a *scire facias* to repeal the patent; and in the case of escheat, a regular inquisition is indispensable. Until the grant of the Commonwealth is annulled, a person claiming and holding under it, cannot be considered as a *malæ fidei* possessor. The validity of the laws in question, has been confirmed by innumerable decisions; and they have been always strictly confined in their operation to cases of conflicting titles under grants, and have never been extended to protect a *malæ fidei* possession.[b]

2. The general principle of equity is settled by a series of decisions, both in England and in this country. A leading case on this subject, is that of the *Duke of Bolton* v. *Deane*.[c] There the

a 1 *Bibb's Rep. Preface.*

b 1 *Marsh. Kentucky Rep.* 443. 2 *Marsh.* 214. 3 *Bibb's Rep.* 298. 4 *Bibb's Rep.* 461. 1 *Marsh.* 246, 247.

c *Finch's Prec. in Ch.* 516.

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doctrine was established, that if the lessor suffers the lessee to hold over, equity will not compel the tenant to account for mesne profits, unless the lessor was hindered from entering by fraud, or some extraordinary accident. The same principle is laid down, as to mesne profits, in several other adjudged cases.[a] And wherever there has been any default or laches on the part of the true owner in asserting his title, the account is restrained to the filing of the bill.[b] So, where a man suffers another to build on his ground, without setting up a right till afterwards, a Court of equity will compel the owner to permit the builder to enjoy it quietly.[c] The same principle has been recognised by our own Courts, and is also to be found among the maxims of the Roman law.[d]

3. As to the compact of 1789, between Virginia and Kentucky, it is a treaty for good faith; a mere recognition of the principles of natural law and morality. A change of sovereignty does not usually make any change in proprietary interests in the soil; and the compact is merely declaratory of that principle of public law. The Louisiana treaty contains stipulations for the protection of the property of the inhabitants, but it has never been construed to limit the sovereign rights of the United States over the domain of that province.

a 3 *Eq. Cas. Abr.* 588. tit. *Mesne Profits.* 1 *Atk.* 526.

b Dormer v. Fortescue, 3 *P. Wms.* 136.

c East Ind. Company v. Vincent, 2 *Atk.* 83.

d Southall v. M'Kean, 1 *Wash.* 336. 2 *Domat's Civ. Law,* 432. *Strahan's Translation.* *Kaimes' Eq.* 189. 1st Ed. 270.

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Neither did the compact of 1789 intend to limit the sovereignty of Kentucky. It is merely a stipulation for the conservation of titles in their integrity: for fair and impartial legislation upon the rights of property which were originally derived from the laws of Virginia. It could not have meant to prevent the modification of remedies in the Courts, and generally what is called the *lex fori*. According to the doctrine contended for on the other side, the legislature of Kentucky could not even extend the time for entering surveys: than which nothing could be more absurd and extravagant.

But the true principles by which the compact is to be interpreted have already been settled by this Court. In *Bodley* v. *Taylor*, it is laid down, that if the same measure of justice be meted to the citizens of each State; if laws be neither made nor expounded, for the purpose of depriving those who are meant to be protected by the compact of their rights; no violation of the compact can be said to exist.[a] This case also determines the principle, that the decisions of the local Courts are to be followed: and the inconveniences which would flow from shaking the system of land titles established by the uniform series of their adjudications, is insisted on as a reason for adhering to the rules of property thus established.[b] So, also, this Court has solemnly sanctioned the act of Kentucky, giving further time for surveys; as well as

a 5 *Cranch's Rep.* 223. *b Ib.* 234.

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the statute of limitations of that State; and the act concerning champerty and maintenance.[a]

The system of legislation now in question, does but follow the maxims laid down by Montesquieu, that the laws should encourage industry; that the more climate, and other circumstances, tend to discourage the cultivation of the earth, the more should the legislator excite agriculture; and that those laws which tend to monopolize the lands, and take from individuals the proprietary spirit, augment the effect of those unfavourable circumstances.[b] Here, though it is acknowledged that the titles are to be decided according to the laws of Virginia, existing at the epoch of the compact, a new proprietary interest has grown up since, not foreseen nor provided for. The possessor in good faith has covered the face of the country with his own property, the fruits of his toil and industry, which it is not just that the owner of the unimproved land should take from him, without an indemnity.

Again: how can this Court interfere, after the settled decisions of the local Courts has confirmed the validity of these laws, and thus disturb the rules of property which have been firmly established; and that too in a case where the parties on both sides, really interested in the controversy, are citizens of the same State? The subject is not within the jurisdiction of the Court, either as to the character of the parties really interested, or

a 2 *Wheat. Rep.* 324. 1 *Wheat. Rep.* 292.
b *Esprit des Loix*, b. 14. c. 6. 8, 9. 11.

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as to the subject matter of the controversy. The jurisdiction originally given by the constitution has been defined and limited by the judiciary act, and is not co-extensive with what might have been granted by Congress under the constitution.[a] The States may, with the consent of Congress, make compacts or agreements with each other; but they cannot make a *treaty*, even with the consent of Congress. The judicial power then does not extend to such compacts, considering them as treaties, nor does that clause of the constitution, which prohibits the States from making any law impairing the obligation of contracts, apply to the present case. That prohibition can only be fairly construed to extend to contracts between private individuals, or at most between a State and individuals. An agreement or compact, between two different States, in their sovereign capacities, and respecting their sovereign rights, can never, by the utmost latitude of construction, be brought within the grasp of a prohibition, which was evidently intended merely for the protection of private rights, growing out of private contracts. or out of a grant from the State, vesting a proprietary interest in the grantee. The only remaining question then is, whether this Court can declare a State law void, as being repugnant to the constitution of the State, contrary to the uniform decisions of the State Courts, who are the rightful exclusive expounders of their own local law? It is

a United States v. Bevans, 3 *Wheat. Rep.* 336. 387. 390. United States v. Wiltberger, 5 *Wheat. Rep.* 93.

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conceived that this point is irrevocably settled by the decisions of this Court.[a] But even supposing this to be a mistaken inference, it is quite clear, from the uniform language and conduct of the Court, that it will not declare an act, whether of the State or national legislature, to be void, as being repugnant to the fundamental law, unless in a very clear case. Besides, there is the less necessity for the interference of the Court in the present case, as the compact itself provides a tribunal for the adjustment of any disputes which may arise under it; and that stipulation, if it does not entirely exclude the jurisdiction of any other tribunal in all cases arising under it, will at least furnish a motive for great caution on the part of the national judiciary in a case where, if citizens of Kentucky alone are interested, they ought to be bound by the decisions of their own Courts; and if the rights of citizens of Virginia are involved, it depends upon the pleasure of that State to create the tribunal by which they are to be determined.

Mr. *Clay*, on the same side, stated, that the great question in the cause was, what is that paramount rule, with which these laws are to be compared, and, if found repugnant, to be declared void by this Court. If the jurisdiction now to be exercised arises under that clause of the national constitution, prohibiting the individual States from making any law impairing the obligation of contracts, then the Court may draw to its cognizance

a Calder v. Bull. 3 *Dall. Rep.* 386.

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the subject matter in controversy. But if otherwise, then it can only acquire jurisdiction by the character of the parties litigant, as being citizens of different States, and so entitled to the protection of the federal forum.

The first inquiry then would be, whether there was any subsisting compact between the States of Virginia and Kentucky, upon which the jurisdiction of the Court could fasten?

If there be a compact, it must be between *parties* capable of making it; upon a *subject* on which they might constitutionally stipulate; and made in a *form* warranted by the constitution.

Waving the question as to the *parties*, he would contend,

1st. That the supposed compact had not been constitutionally made; and,

2dly, That if the compact is to be interpreted as restraining the State of Kentucky from passing the laws in question, the restraint itself would be unconstitutional and void.

1. Both by the original articles of confederation, and the existing national constitution, the States are prohibited from treating or contracting with each other, without the consent of Congress. The terms of the prohibition in the constitution, are very strong: "*No* State shall, without the consent of Congress, enter into *any* agreement or compact with another State, or a foreign power." It extends to all agreements or compacts, no matter what is the subject of them. It is immaterial, therefore, whether that subject be harmless or dangerous to the Union. There is here no

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room for interpretation. "*Any* agreement or compact" are the words, and all contracts between the States, without the consent of Congress, are interdicted. To make, therefore, the supposed compact binding, it must have been entered into with that consent. It is not now insisted, (though perhaps it might be,) that this consent must *precede* the compact. All that will be asked is, (what cannot be denied,) that it must either precede or follow the compact.

In the present case, there is no pretence for alleging a subsequent *express* assent. Was there then a *prior* one? The act of Virginia did not even profess to ask the consent of Congress to the compact. All that it demanded, was, that Congress should consent to the admission of the proposed State into the Union, &c. and Congress has not even responded to all that was asked. What it has assented to, can only be ascertained by resorting to the language it has thought fit to use. The act of February 4, 1791. (by which alone the will of Congress on this subject is signified,) merely declares the consent of that body to the erecting of the District of Kentucky into a separate and independent State, and its reception into the Union upon a certain day. Beyond what was asked of it, Congress has not gone: as to the rest of the matters connected with these, it was altogether passive. There was then no compact. It was a mere negotiation: for the people of Kentucky did not meet in convention until 1792, when it is supposed that their assent to the compact was given.

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But it may be said, that though Congress did not expressly consent, yet it acquiesced in the compact, which is equivalent. This is what is denied. The consent of Congress being required, it must be evidenced by some positive act. Congress is a collective body, or, rather, it consists of three bodies, each of which participates in the exercise of the legislative power of the nation. The forms and ceremonies of passing laws must be observed. The doctrine of acquiescence cannot apply to the exercise of such a sovereign power. Did the House of Representatives; did the Senate; did the President, acquiesce? How do you ascertain it? Their *silence* cannot be interpreted into acquiescence. It was not necessary for them to interpose, in order to prevent that, which, without their consent, would be a mere nullity. If they had actually interposed by an express prohibition, in the most solemn form, it could not make the compact more void than it was before. Being a nullity, from an inherent defect in its original formation, it could not be made more so, by any extraneous act. Never having existed, its existence could not be destroyed by any conceivable power whatever. Indeed, to set up the doctrine, that Congress can tacitly acquiesce in agreements, unconstitutionally made between the States, would be of most dangerous and fatal consequences. It would sanction whatever agreements the several States might choose to make with each other, and introduce chaos into the confederacy, by engagements between its different members, inconsistent with

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each other, and conflicting with the duties they all owe to the Union. All the analogies of the constitution are against such a doctrine. Various prohibitions of the exercise of different powers by the States, without the consent of Congress, are contained in the constitution. Thus, they are prohibited, without that consent, from laying imposts or duties on imports or exports, except such as are necessary for executing the inspection laws; or any tonnage duty; and from keeping troops or ships in time of peace; and from engaging in war, unless actually invaded, or in such imminent danger as will not admit of delay. These prohibitions are all connected in the same clause with the prohibition against their making contracts with each other. Yet, surely, it cannot be pretended, that in all these cases the consent of Congress can be inferred from its silence. It is true, that the consent of Congress to such acts, has not always been asked by the States. But it was their duty to have asked it; and the acts are mere nullities unless the consent be obtained.

2. If the supposed compact is to be interpreted to restrain the State of Kentucky from passing the laws in question, such restraint would be unconstitutional.

It is incontestable that there are some attributes of sovereignty, of which a State cannot be deprived, even with the concurrence of Congress and the State itself. The true theory of our government is, that of perfect equality among the members of the Union. Whatever sovereign powers one has, each and all have. A State may

refuse to allow another State to be carved out of its territory; but if it consents to the formation of a new State, such new State becomes invested with all the sovereign attributes of every old one. Congress may refuse to admit a new State; but if it admits it, the State stands in the Union, freed and liberated from every condition which would degrade it below its compeers. Whatever one State can do, all can do. The pressure of the whole on all the parts, is equal, and all the parts are equal to each other. This implied prohibition extends to every compact, in every form, by which a State attempts to deprive itself of its sovereign faculties. The sovereignty of a State cannot exist without a territorial domain upon which it is to act: and there can be no other restrictions upon its action within its own territory, but what is to be found in its own constitution, or in the national constitution. Of all the attributes of sovereignty, none is more indisputable than that of its action upon its own territory. If that territory happens to be in a waste and wilderness state, it may pass laws to reclaim it; to encourage its population; to promote cultivation; to increase production. That any of the old States can pass such laws, is incontestable; and if they may rightfully do it, then Kentucky may do the same.

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If then there be no compact constitutionally made, and could have been none, with the power of restricting the State legislature from passing the laws in question, there is no fundamental rule, with the violation of which they stand chargeable.

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But it may be said, that this rule is incorporated into the State constitution.

To this it is answered, that the incorporation of the supposed compact into the State constitution, did not make it a compact, if otherwise it wanted the requisite sanctions under the Federal constitution. If it were inserted upon the mistaken supposition of its being a binding contract, does the insertion produce any effect? Is it not to be considered as the insertion of that which, being before void, remains null, notwithstanding the insertion? That it is not made a compact by the insertion, is clear: for the prohibition upon the States, to contract or agree, without the consent of Congress, is a prohibition to contract or agree in any form, constitutional or otherwise.

But, although it has not the properties of a compact, it may possibly be contended that it is nevertheless a part of the constitution of Kentucky, and, therefore, binding upon the legislature of the State. The convention of Kentucky proceeded upon the notion that it was a compact. If in that they were mistaken, ought it to be treated in a character which was never intended? Can it be treated in that character? There are reciprocal provisions in it. Supposing it to be no compact, those stipulations on the part of Virginia, which formed the consideration of stipulations on the part of Kentucky, would not be binding on Virginia. It would, therefore, be most unjust to hold Kentucky bound for grants, the equivalents for which she cannot enforce. If one party is not bound, the other ought to be deemed free: and

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the incorporation of the compact into the constitution of Kentucky, ought to be considered as proceeding upon the erroneous supposition. It was the *compact*, emphatically, that was made a part of the constitution. If there were no compact, nothing was inserted: or it was the will of one party, expressed in the most solemn form, to which there was wanting the will of the other, or the federal sanction, to make it a compact. If, notwithstanding the freedom of Virginia from any obligations, Kentucky is to be regarded as bound by her separate constitutional act, then the question is, what did she intend by that act? Who is to expound it? Are we to look for the meaning of the constitution of a State within the State itself, or are we to look abroad for foreign interpreters? It need not be denied, that in case of an appeal to the Federal tribunals, by citizens of other States, against the acts of local legislation, upon the ground of repugnance to the State constitutions, they may pronounce on that repugnancy. But it must be a clear case of repugnancy to justify them in annulling the State law. And after all the departments of a State government had united in giving an exposition to its constitution, which had been uniformly acted on for a series of years, and become a rule of property, this Court would solemnly pause before it overturned such a construction. This Court, in *Bodley* v. *Taylor*,[a] determined, that it would follow the decisions of one department only (the judiciary) in respect to

[a] 5 Cranch's Rep. 223

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the land laws of Virginia, although it intimated strong doubts of their correctness. The ground on which this determination justly proceeds, is a regard to the peace of society, a respect for the rights of property, and the prevention of those disorders which would flow from opposite and conflicting rules.

The convention, by inserting the declaration in the constitution, that the compact was to be considered as a part of it, could not have intended to prevent the passage of the laws for the benefit of the occupying claimants, because the first of those laws preceded the formation of the last constitution. The State Court of last resort has affirmed the consistency of the law with the compact; and, consequently, its consistency with the constitution.[a] Thus, we have the deliberate adoption of that system by the legislative authority, almost cotemporaneously with the date of the compact; the formation of the present constitution, without disapproving of that system; and an adherence to it by the legislative authority, for a long series of years, during which it has reviewed it, expressly adhered to its principle, and given it a more expansive effect.

3. If the compact is to be treated as one made with all necessary solemnities, the jurisdiction of this Court cannot attach until the party charged with a violation of it has refused to constitute the tribunal of the compact.

The eighth article of the compact provides for

[a] 4 *Bibb's Rep.* 52.

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a special tribunal. That provision is as much a part of the compact as any other. It is admitted, that rights, which existed prior to and independent of the compact, cannot be affected by the decisions of that tribunal. But whatever rights spring out of the compact, originate with it, and are liable to be affected by it. They rest, coupled with all the conditions which the enactment that gave them birth has imposed upon them. If the party complained of for violating the compact had refused to co-operate in the constitution of the tribunal of the compact, then the jurisdiction of this Court might attach under that branch of the distribution of judicial power which gives it cognizance of controversies between the States; (if Congress had made provision for giving effect to that part of the constitution;) or perhaps the Court might, in such case, exercise jurisdiction as between the individuals interested. If there be cause of complaint, it is by Virginia against Kentucky. But Virginia has never (until recently) complained: she has acquiesced: and Kentucky, so far from refusing to create the tribunal of the compact, has offered to refer to it this very matter.

It will probably be contended, that this provision is like the ordinary stipulation in policies of insurance, and other contracts for referring to arbitration, which has never been held to exclude the jurisdiction of the ordinary Courts of the land. But the ground on which the Courts of Westminster have assumed jurisdiction in such cases is

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that of their transcendent authority.[a] If it were *res integra*, there would certainly be great reason to contend, that, in these cases, the *forum domesticum* stipulated for by the parties ought to have exclusive jurisdiction. But, be this as it may, there is this plain distinction, that the Courts of Westminster Hall have a general jurisdiction over the realm, whilst this Court is one of limited jurisdiction, having special cognizance of a few classes of cases only. So far as that jurisdiction results from the will of the States, who are parties to the compact, it must be taken with the restrictions which that will imposes. The parties, in effect, say,—"We make such a contract; if we differ about its interpretation, or execution, we will constitute a special tribunal to decide that difference." Congress might indeed give you jurisdiction over the compact, by providing a mode in which your constitutional jurisdiction over controversies between the States shall be exercised. But all jurisdiction over sovereign States, (however derived,) is limited by the very nature of things. Suppose this were a foreign treaty, and provided for a reference to the arbitration of a foreign sovereign, would you take jurisdiction in that case?

Supposing, however, that the Court should feel itself compelled to take cognizance of the present cause, as being a private controversy between citizens of different States, it will exercise its power with the most deliberate caution. This Court is invested with the most important trust that was

[a] 2 *Marsh. Ins.* 679.

ever possessed by any tribunal for the benefit of mankind. The political problem is to be solved in America, whether written constitutions of government can exist. They certainly cannot exist without a depositary somewhere of the power to pronounce upon the conformity of the acts of the delegated authority to the fundamental law. This Court is that depositary, and I know not of any better. But the success of this experiment, so interesting to all that is dear to the interests of human nature, depends upon the prudence with which this high trust is executed.

4. The compact, supposing it to be valid and binding, does not prohibit the passage of these laws.

The mode by which private individuals could acquire a part of the public domain in Virginia, as prescribed by the act of 1748, was by a survey, accompanied with certain specified improvements.[a] If not settled within three years, the grant was forfeited, without any formal proceeding to repeal the patent. In 1779 commenced the calamitous system under which Kentucky now suffers. In order to raise a revenue, and provide for the defence of the frontier, the previous survey was dispensed with; and hence the conflicting claims, which now cover the whole surface of the country. At the period of the separation of the two States, the titles acquired under the law of 1779 were incomplete, and in every stage of progression, from the entry

a Leigh's Rev. Virg. Laws, 333.

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to the patent. Virginia was about to part with the sovereignty; that is, with the power of consummating the titles and fulfilling her engagements. If she made no provision; if she obtained no guarantee for the complete execution of her engagements; if she exposed those who had acquired the right to, or interests in, land from her, to the uncontrolled action of the new sovereignty, she might justly be reproached with infidelity to her engagements. Faithful to these, the stipulation in question was inserted. The object, and the only object of it, was to notify the new State that it must not abuse its power to the detriment of persons claiming under Virginia, and to proclaim to those persons her parental attention to their interests. It was to announce to them, and to the new State, that their titles were to remain valid and secure under the new sovereign. It was a devolution upon the new sovereign of all the duties towards them of the old sovereign, and nothing more. It was to bind the new State as far as Virginia was bound, but to leave it as free as she would have been had there been no separation. Virginia could have had no imaginable motive to prevent the new State from exercising all the accustomed rights of sovereignty. On the contrary, she displayed a solicitude for the admission of the new State into the Union, making it a condition of its independence. In conformity with this view is the language of the third article: It provides, "that all private rights and interests of lands, within the said district, derived from the laws of Virginia, prior to such separation,

shall remain valid and secure under the laws of the proposed State, and shall be determined by the laws now existing in this State." If the reason for using the terms "rights and interests," be attended to, it will be seen, that it is a guarantee for the security of the title, and nothing but the title. It is no restriction upon the new sovereignty as to any public policy which it might think fit to adopt. All the parts of the compact are to be taken together, and one article may serve to expound another, where there is ambiguity. What is meant by the third, may be ascertained by the fourth condition. That is a clear recognition of the right of the new State to enforce cultivation or improvement, by forfeiture or other penalty. It expressly recognises the right to exercise that power forthwith as to citizens; and, as to non-residents, merely leaves a reasonable time (six years) to enable them to settle and improve. It admits the right of the State to effect the object by forfeiture or *other* penalty. If the parties to the compact had intended, by a provision for the security of the title, to exclude the legislative authority from acting at all upon the subject, would they have left that subject exposed to the most formidable action of the sovereign power, by forfeiture or other penalty?

The Courts of Kentucky, the people of Kentucky, the legislature of Kentucky, have all proceeded upon the principle of the perfect validity of the titles derived from the laws of Virginia. Every body is interested in the preservation of those titles. The legislative system of Kentucky

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does not begin to act until the system of Virginia has had its complete effect. After the decision upon the title, and after it has been pronounced valid; after the terms of the compact are completely fulfilled; the laws of Kentucky commence their operation. When they do operate, it is not upon the title, but upon the subject. It is not on account of any defect in the title, that they operate at all. They spring from those considerations of policy which a sovereign State has a right to weigh and give effect to. The title is admitted; but from other causes *dehors* the title, the owner of it is not compelled to pay for the title, nor for the land, which he had a right to only in its native State: but he is compelled (on grounds of public policy) to pay for something which is not inherent in the title, which does not naturally belong to the land. If this be not according to the true interpretation of the compact, then the erection of Kentucky into an independent State was a solemn mockery. It was a grant of the sovereignty, without a capacity to exercise it; and a transfer of the sovereign power of Virginia to the new State, with a prohibition to the exercise of any sovereign power. If the compact restrains her from legislating on the subject to this extent, it goes a great deal further, and exempts the subject entirely from her legislative jurisdiction. She could not tax the lands of non-residents; nor subject the land to the payment of debts in any novel manner; nor make a new law of descents; nor establish a ferry; nor lay out a road; nor build a town. In short, she can exert no sovereign power

whatever over the subject. For if those considerations of public policy, which led her to adopt the system of compensation to the *bonæ fidei* occupant, cannot prevail, neither could similar considerations in any other case prevail to authorize her legislative interference. The Virginia code, of 1789, must immutably govern the territory.

But it may be said, that the words of the third article must mean something more than a mere security of the title, according to the laws under which it is derived; otherwise, the insertion of the article was utterly useless, since it would create no obligation other than what would exist without it. The answer to this is, that the necessity of such a stipulation grew out of the very extraordinary state of land titles in Kentucky. Even, however, if this reason had not existed, instances might be cited, without number, of similar precautions in international pacts and treaties. Such are, among others, the cession by Virginia of her western territory to Congress, which contains a confirmation to the settlers of Kaskaskias, Vincennes, &c. of their possessions and titles; the Louisiana treaty; and the Florida treaty, all of which contain similar confirmations.

It may, however, be urged, that the rights and interests in land, as derived from the laws of Virginia, cannot be valid and secure, if these acts have their effect: that there would be a nominal compliance with the compact, but a real violation of it.

If the laws operated on the title; if they obstructed or defeated it, the argument would in-

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deed have weight. It would, however, at the same time, be equally applicable to a case of forfeiture for non-settlement or non-cultivation; for in that case, too, it might be said, that you admit the title, but forfeit the land. So, in all other cases where the State exercises its right of eminent domain, it might be said that the title was acknowledged, but the land taken away. The ground on which the laws repose, is not that of any inherent taint or defect in the title. It is one of policy, founded on the peculiar condition of the country; the multitude of dormant claims to the same land; the non-assertion of their titles by adverse claimants; and the necessity of encouraging improvement. The decisions of this Court conform to these principles of interpretation. In *Wilson* v. *Mason*,[a] the Court says, "It must be considered as providing for the preservation of titles, not for the tribunals which should decide on those titles." The laws are of universal and impartial application. They apply as well between citizens of the State, as between them and non-residents. Such an application of them was considered by the Court, in *Taylor* v. *Bodley*,[b] as a conclusive test of their validity.

5. If the compact limited the action of the new sovereignty to the situation of the Virginia laws respecting real property, in all cases whatever, at the period of the separation; still, it is insisted, that the *principle* on which the occupying claimant laws are founded, had been recognised by that

a 1 *Cranch's Rep.* 45. 91. *b* 5 *Cranch's Rep.* 223.

State, and was then in force, and that Kentucky had a right to constitute the tribunals which should execute it, and to direct its application. That the whole subject of *remedy* devolved on the new State, is too clear a proposition to be contested. It might refuse to establish Courts of justice at all. It might adopt the civil law or the Napoleon code. It might abolish the Court of Chancery. In *Wilson* v. *Mason*,[a] this doctrine was substantially held. The principle of the acts in question, was first adopted by a law of the colony of Virginia, enacted in 1643.[b] It seems that this law never was repealed; and by it, even the occupant, without colour of title, was exempted from the payment of rents on eviction. But on general principles of law and equity, such as they have been recognised in every system of jurisprudence which has prevailed among civilized nations, the meliorations by a *bonæ fidei* possessor are to be paid for on eviction by the true owner; and such possessor is also exempt from responsibility for rents and profits.[c] The whole law of prescription proceeds by the same analogy. *Southall* v. *M'Kean*,[d] is an adjudication on that principle, posterior to the separation, in a case occurring prior to it. *Lowther* v. *The Commonwealth*,[e] proceeded on the same ground; and the case of a party claiming under the State, is much stronger than if he claimed under a private individual. The principle, then, being

a 1 *Cranch's Rep.* 45. 91.
b 1 *Henn. Dig. LL. Virg. Pref.* 15.
c *Kaimes' Prin. Eq.* 26—28. 189.
d 1 *Wash. Rep.* 336. *e* 1 *Henn. & Munf. Rep.* 201.

1823. in existence in the parent State, it was competent to the new State to modify it, and direct its application. The cases are numerous where a principle originally applied by Courts of equity, is adopted by the legislature, and being incorporated into a statute, is enforced by the Courts of law as a legal rule. Such are the cases of set-off, of penal bonds, and the remedy of creditors against devisees.

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6. At all events, the laws are not wholly repugnant to the compact, in their application to every species of action or suit; and the Court will discriminate between the void and the valid provisions. The two laws provide, in substance,

(1.) That there shall be no allowance of rents and profits, prior to notice. (2.) A definition of what shall be considered as notice. By the act of 1797, it is the commencement of a suit, or the delivery of a certified copy of the record on which the party claims, and the bringing a suit within a year. By the act of 1812, it is the rendering a judgment or decree. (3.) That the occupant shall be paid for all valuable and lasting improvements, subject, by the act of 1797, to the restriction, that the value of such improvements after notice, shall not exceed the amount of the rents and profits after notice. (4.) That the occupant shall be chargeable with all waste or damage committed on the land. (5.) That he shall hold possession until the balance due to him is secured or paid. (6.) That a sworn Board of Commissioners shall liquidate the account between the parties. (7.) The right of election given by the act of 1812.

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Are all, and if not all, which of these principles contrary to the compact? Is the repugnancy in the principles adopted, or the mode of executing them? As to what is that notice which shall convert a *bonæ fidei* into a *malæ fidei* possession, it is so uncertain in itself, that it cannot be denied that the legislature has a right to establish a rule of positive institution on that subject. As to the remedy, it may certainly change the form of action, and the proceedings in any action; or convert an equitable into a legal right, with its appropriate legal remedy. Or it may forfeit the whole property, for non-cultivation or non-improvement.

This Court is not a mere Court of justice applying ordinary laws. It is a political tribunal, and may look to political considerations and consequences. If there be doubt, ought the settled policy of a State, and its rules of property, to be disturbed? The protection of property should extend as well to one subject as to another: to that which results from improvements, made under the faith of titles emanating from the government, as to a proprietary interest in the soil, derived from the same source. It extends to literary property, the fruit of mental labour. Here is a confusion of the proprietary interest in the land, with the accession to its value, from the industry of man fairly bestowed upon it. The wisdom of the legislator is tasked to separate the two, and do exact justice to the claimants of each. The laws now in question are founded upon that great law of nature, which secures the right resulting from occupation and bodily labour. The laws

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of society are but modifications of that superior law. If there be doubt respecting their validity, considerations of convenience and utility ought to prevail, in a case where the settled order of a great people would be disturbed. Conquerors themselves respect the religion, the laws, the property of the vanquished: and surely this Court will respect those rules of property which had their origin in early colonial times, which were adopted by the parent State, and have been so long acquiesced in and confirmed by inveterate habit and usage among the people where they prevail.

Mr. *B. Hardin*, for the demandant, in reply, stated, that the cause divided itself into the following questions:

1. What were the laws of Virginia respecting a compensation for ameliorations by a *bonæ fidei* possessor, (for no other could be entitled,) and his accountability for rents and profits, at the time the compact was made?

2. Whether the consent of Congress was given to the compact in the manner required by the constitution of the United States?

3. What is the true exposition of the compact?

4. The exposition of the legislative acts of Kentucky, of 1797 and 1812, and an examination of the question, how far they depart from the laws of Virginia on the same subject matter existing in 1789?

5. Whether this Court has jurisdiction over the cause, and power to declare the acts of Kentucky null and void, as being repugnant to the compact,

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and the constitution of the United States; and whether it will exercise that jurisdiction and power in the present case?

1. The laws of Virginia, respecting this matter, in force at the time of the compact, could only consist of such parts of the common law of England as had been adopted in that State; of the system of equity, and the principles of the civil law, applicable to the question; or, of the then existing local statutes respecting it.

The rule of the common law, as to the action for mesne profits, is well ascertained to be, that the plaintiff is entitled to the mesne profits from the time of the demise laid in the declaration in ejectment, and that the tenant cannot set off his improvements made upon the land.[a] *At law*, then, the occupant was not entitled to compensation for his meliorations: and *in equity*, the universal rule is, that the rents and profits are to be accounted for; though, under some circumstances, the *bonæ fidei* occupant will be allowed to deduct the value of his improvements, *i. e.* of the increased value of the land.[b] But, both by the chancery rule, and that of the civil law, the *bona fides* of his possession ceases the moment he has notice of the adverse better title. In the case cited on the other side, of *Southall* v. *M'Kean*,[c] the Court of Appeals of Virginia did not mean to impugn the rule uniformly applied by the English Court of Chancery. It went on the

a 1 *Runnington's Eject.* 437, 438.

b 1 *Madd. Chanc.* 73, 74. c 1 *Wash. Rep.* 336.

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ordinary ground, that he who will have equity must do equity: and that if a party purchases land, with notice of another's equitable title, but that other lies by, and neglects to assert his right for a long time, during which, valuable improvements are made, the purchaser ought not, in equity, to lose these improvements. Still less does the case of *Lowther* v. *The Commonwealth*[a] impugn the rule. It decides nothing more than that where land is sold with warranty, and the vendee is evicted, he shall recover of the vendor, not the value of the land at the time of eviction, but the purchase moneys, with interest.

2. The consent of Congress was given to the compact between Virginia and Kentucky, in the manner required by the constitution of the United States. No particular form of words is necessary to signify this assent. Congress had the compact before them, and have agreed to the agreement for the formation of the new State, and its admission into the Union. The State Courts have repeatedly and constantly recognised the validity of the compact:[b] and if this Court were now to determine it to be void, Kentucky would be compelled to recede the whole country south of Green River, which was one of the equivalents she received for the stipulations on her part. The compact is also recognised as valid and binding by the sovereign authority of the people of Kentucky,

a 1 *Henn. & Munf. Rep.* 201.

b 1 *Marshall's Kentucky Rep.* 199. Brown v. M'Murray, MS. decision of the Court of Appeals of Kentucky.

being incorporated into the State constitution, and thus made a part of their fundamental law.

3. As to the interpretation of the compact, (supposing it valid,) if that on the other side be correct, the compact is merely declaratory of the public law as applicable to the case. It is a well established principle, that changes of sovereignty work no change in the rights of property in the soil; and this applies even to such rights acquired by governments *de facto*, established by violence, against legal right. The stipulations inserted in the treaties, and other public pacts, referred to on the other side, are merely in affirmation of this principle of universal law. Such is the stipulation in the third article of the Louisiana treaty, that " the inhabitants of the ceded territory *shall be maintained and protected in the free enjoyment of their* liberty, *property*, and the religion they profess." Such a general provision must be considered as merely declaratory of what the high contracting parties understood and admitted to be the law of nations, as to the effect of a change of sovereignty on proprietary interests of private individuals. But how much broader and stronger is the provision in the compact, that " all rights and interests of land derived from the laws of this State, (i. e. Virginia,) shall remain valid and secure, and shall be determined by the laws now existing in this State." It must surely have been meant to protect, not merely the naked title, but the beneficial enjoyment of the interest in the land. The public law of the world, and the constitution of the United States, would have been

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sufficient to protect the mere naked title.[a] "ALL private rights and interests," legal and equitable, were to "remain valid and secure." The term *valid* is applicable to *rights*, and the term *secure* to *interests*, and both to each. But the provision does not stop here. These "rights and interests" are to be "determined *by the laws now existing in this State.*" Most certainly this was not intended to prevent Kentucky from making general regulations on the subject of real property, and the remedies applicable to it, so far as they make a part of the *lex fori*. But she stipulates, that she will not affect injuriously "private rights and interests," of land derived under the laws of Virginia, i. e. the beneficial proprietary interest in land. The MS. case of *Brown* v. *M'Murray*, shows that this exposition has been given to the compact by the Court of Appeals of Kentucky. So, also, the Circuit Court in that District has determined that the act of Assembly of Kentucky, of 1814,[b] which alters the statute of limitations of 1808, as to real actions,[c] by taking away the proviso in favour of non-residents, is void, as being repugnant to the compact, not merely as an alteration of the remedy, but as rendering invalid and insecure the rights and interests of land derived under the laws of Virginia.

As to the objections made on the other side to our interpretation of the compact, that it impugns

a Fletcher v. Peck, 6 *Cranch's Rep.* 143. *Per* Mr. Justice JOHNSON.

b 5 *Littel. LL. of Kentucky*, 91.

c 4 *Littel. LL. of Kentucky*. 56.

the right to the pursuit of happiness, which is inherent in every society of men, and is incompatible with these unalienable rights of sovereignty and of self-government, which every independent State must possess, the answer is obvious: that no people has a right to pursue its own happiness to the injury of others, for whose protection solemn compacts, like the present, have been made. It is a trite maxim, that man gives up a part of his natural liberty when he enters into civil society, as the price of the blessings of that state: and it may be said, with truth, this liberty is well exchanged for the advantages which flow from law and justice. The sovereignty of Kentucky will not be impaired by a faithful observance of this compact in its true spirit. It does not prevent her from making any general regulations of police and revenue, which any other State may make; but it does prevent her from confiscating the property of individuals under the pretext of a mere modification of the law as to improvements made by occupying claimants. There can be no doubt that sovereign States may make pacts with each other, limiting and restraining their rights of sovereignty as to proprietary interests in the soil. Such conventions are not inconsistent with the eminent domain which the law of nations attributes to them. Here the sole object of the compact is perpetually to secure the vested rights of private individuals from violation by legislative acts. It is in furtherance of the most sacred duty which society owes to its members. And even if it stipulated a special restraint upon the legisla-

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tive power, in respect to the public revenue, it would not be the less obligatory. All the new States, on their admission into the Union, uniformly bind themselves not to tax the lands of the United States. Various other restraints upon their sovereign powers have been voluntarily consented to by the States: such, for example, as that contained in the act for the admission of Louisiana into the Union, which provides that all the legislative proceedings shall be conducted in the English language.

But this compact, so far from interfering with the revenue of Kentucky, plainly recognises her right to tax the lands: and if it did not, it is clear that she might exercise the right, since she could not exist nor support her civil government without a revenue. The means involve the end; and therefore she may not only tax, but sell the lands to enforce payment. Nor is there any thing in the compact interfering with the legislative authority of the State, to regulate the course of descents, or the liability of real estates for the payment of debts. An alteration of the law of descents does not affect the right, title, or interest in land, as derived from the laws in force at the epoch of the compact: unless, indeed, the new law of descents be retrospective in its operation. Nor is it denied, that the remedies in the Courts of law and equity, the *lex fori*, may be modified, as the wisdom of the legislature shall deem expedient. The forms of action, real and possessory, may be changed; the remedy, whether legal or equitable, may be adapted to the purposes of jus-

tice; the period of limitation, and the mode of execution; all these may be modified and altered, according to the fluctuating wants of society, provided they do not have an unjust retrospective operation upon vested rights. All these changes in the civil legislation of the State may be made, and the titles to land, as acquired under the laws of Virginia, will still remain unimpaired.

4. A fair exposition of the legislative acts of 1797 and 1812, will show that they operate to invalidate the rights and interests of land, derived under the laws of Virginia.

And first, as to the law of 1812. It was intended for the protection of any person "peaceably seating or improving any vacant land, supposing it to be his own in law or equity." The land, not being occupied by the true owner, it is not necessary (under this law) that the party occupying it should *bona fide* and honestly believe it to be his own property: but only that he should believe it to be so from the circumstance of his "having a conneeted title." The law supplies him with his ground of belief, or rather it substitutes a fact in the place of his belief. The State Courts, whose peculiar province it is to interpret the local law, have expressly determined, that the words "supposing them to be his own," &c. are satisfied if the party had that foundation for his supposition. No matter how much *mala fides* there may be, if the possession was vacant, and he can deduce a connected paper title. This interpretation goes far beyond the ancient Chancery rule, and therefore the statute goes beyond the

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principle of that rule. Besides, the rule of equity only pays the occupant for the increased value of the land : not for " improvements," (in the sense which local usage has given to that word, as indicating any fixtures annexed to the freehold,) but only for actual ameliorations in the value of the land. The statute, on the contrary, compensates him for accessions to the property, which are really deteriorations instead of ameliorations of its value to the real owner. The terms used by the legislature—" the charge and value of seating and improving," shows evidently that it meant to transcend the rule of equity, which, according to Lord Kaimes, goes to make compensation for ameliorations only. The whole discussion in the legislature turned on these emphatic words, " charge and value ;" and various amendments were proposed to strike them out of the bill, and to proceed on the true chancery principle of taking a fair account between the parties, of rents and profits on the one side, and the actual amelioration of the property on the other.

5. The law in question is both a violation of the compact and the national and State constitutions ; and the Court will declare it void.

It is void by its retrospective operation, in giving compensation for work and labour antecedent to the epoch of the compact of 1789, and even back to the first settlement of the country ; and that, too, whether this work and labour bestowed upon the land actually deteriorated or ameliorated its value. It may be admitted, that it is not an *ex post facto* law in the sense of the constitutional prohibition,

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as that is only applied to penal matters. But, upon general principles, all retrospective laws, whether civil or criminal, are unjust, and contrary to the fundamental maxims of universal jurisprudence. The nature of the social state, and of civil government itself, prescribe some limits to the legislative power, independent of the express provisions of a written constitution.[a] What is a retrospective law, has been well defined by one of the learned judges of this Court, and it is a definition which admits of an accurate and practical application. "Upon principle, every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions already past, must be deemed retrospective."[b] There is something in the very nature of all just legislation, which prevents its being retrospective. It necessarily deals with future, and not with past transactions.[c]

The statute now in question is retrospective in releasing rights of action already vested. By the pre-existing local law, the successful claimant was entitled to recover the mesne profits even in a real action. But this act deprives him of this right, as to rents and profits previously acquired, and even antecedent to the compact itself; and repeals the saving clause in the former act as to infants, &c. It is, in effect, a law releasing A. from the right of action which B. has against him.

a Fletcher v. Peck, 6 *Cranch's Rep.* 135.

b Per Mr. Justice STORY. Society, &c. v. Wheeler, 2 *Gallis. Rep.* 139.

c 4 *Wheat. Rep.* 578. Note *a*.

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But even considered as a prospective enactment, the law operates unjustly and oppressively, because the lawful owner is compelled to pay, not merely for the actual ameliorations in the land, not its increased value only; but the expense incurred by the occupant in making pretended improvements, whether they are merely useful, or fanciful, and matter of taste and ornament only, dictated by his whim and caprice. He is not even liable for waste, unless committed after suit brought; and may destroy the timber, constituting, perhaps, the sole value of the land, without being called to any account.

If the law be partly constitutional, and partly not, the whole must fall; and there can be no doubt, that the character of the parties, as being citizens of different States, gives the Court cognizance of the cause, and jurisdiction to pronounce the law a nullity. If you have jurisdiction, you must decide according to law. But you cannot so decide, without looking to see whether the acts of the State legislature are repugnant to the State constitution. This repugnancy has been frequently made the ground of decision in the Federal Courts, where the character of the parties gave them jurisdiction of the cause.[a]

But the acts are clearly void, as being repugnant to the constitution of the United States. They are laws impairing the obligation of contracts, within the spirit of all the decisions of this Court, according to which, it is immaterial whether the

[a] Society, &c. v. Wheeler, 2 *Gallis. Rep.* 105.

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sovereign States of the Union are parties to the contract, or whether it is made between private individuals.[a] The special tribunal provided by the compact, cannot oust the transcendent jurisdiction of this Court. Even according to the maxims of private jurisprudence, an agreement to submit to arbitration cannot be pleaded in bar, without an award actually made; and this must apply in a case where the agreement, though made by the high contracting parties, was intended exclusively for the benefit of private individuals, and for the protection of private rights.

Feb. 27th, 1823.

Mr. Justice WASHINGTON delivered the opinion of the Court. In the examination of the first question stated by the Court below, we are naturally led to the following inquiries: 1. Are the rights and interests of lands lying in Kentucky, derived from the laws of Virginia prior to the separation of Kentucky from that State, as valid and secure under the above acts as they were under the laws of Virginia on the 18th of December, 1789? If they were not, then,

2dly. Is the Circuit Court, in which this cause is depending, authorized to declare those acts, so far as they are repugnant to the laws of Virginia, existing at the above period, unconstitutional?

The material provisions of the act of 1797, are as follow:

a Fletcher v. Peck, 6 *Cranch's Rep.* 87. New-Jersey v. Wilson, 7 *Cranch's Rep.* 164. Terret v. Taylor, 9 *Cranch's Rep.* 43. Dartmouth College v. Woodward, 4 *Wheat. Rep.* 518.

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1st. That the occupant of land, from which he is evicted by better title, is, in all cases, excused from the payment of rents and profits, accrued prior to actual notice of the adverse title, provided his possession in its inception was peaceable, and he shows a plain and connected title, in law or equity, deduced from some record.

2d. That the claimant is liable to a judgment against him for all valuable and lasting improvements made on the land prior to actual notice of the adverse title, after deducting from the amount the damages which the land has sustained by waste or deterioration of the soil by cultivation.

3d. As to improvements made, and rents and profits accrued, *after notice of the adverse title*, the amount of the one was to be deducted from that of the other, and the balance was to be added to, or subtracted from the estimated value of the improvements made before such notice, as the nature of the case should require. But it was *provided* by a subsequent clause, that "no case should the successful claimant be obliged to pay for improvements made *after notice*, more than what should be equal to the rents and profits.

4th. If the improvements exceed the value of the land in its unimproved state, the claimant was allowed the privilege of conveying the land to the occupant, and receiving in return the assessed value of it without the improvements, and thus to protect himself against a judgment and execution for the value of the improvements. If he should decline doing this, he might recover possession of

his land, but then he must pay the estimated value of the improvements, and lose also the rents and profits accrued before notice of the claim. But to entitle him to claim the value of the land, as above mentioned, he must give bond and security to warrant the title.

The act of 1812 contains the following provisions:—1. That the peaceable occupant of land, who supposes it to belong to him, in virtue of some legal or equitable title, founded on a record, is to be paid by the successful claimant for his improvements. 2. But the claimant may avoid the payment of the value of such improvements, if he please, by relinquishing his land to the occupant, and be paid its estimated value in its unimproved state; thus—

If he elect to pay for the value of the improvements, he is to give bond and security to pay the same, with interest, at different instalments. If he fail to do this; or if the value of the improvements exceed three fourths the value of the unimproved land, an election is given to the occupant to have a judgment entered against the claimant for the assessed value of the improvements, or to take the land, giving bond and security to pay the assessed value of the land, if unimproved, with interest. and by instalments.

But if the claimant is not willing to pay for the improvements, and they should exceed three fourths the value of the unimproved land, the occupant is *obliged* to give bond and security to pay the assessed value of the land, with interest, which, if he fail to do, judgment is to be entered against

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him for such value; the claimant releasing his right to the land, and giving bond and security to warrant the title.

If the value of the improvements does not exceed three fourths that of the land, then the occupant is not *bound* (as he is in the former case) to give bond and security to pay the value of the land, but he may claim a judgment for the value of his improvements, or take the land; giving bond and security, as before mentioned, to pay the estimated value of the land.

3. The exemption of the occupant from the payment of the rents and profits, extends to all such as accrued during his occupancy, before judgment rendered against him in the first instance. But such as accrue after such judgment, for a term not exceeding five years, as also waste and damages committed by the occupant *after suit brought*, are to be deducted from the value of the improvements; or the Court may render judgment for them against the occupant.

4. The amount of such rents and profits, damages and waste; also the value of the improvements, and of the land, clear of the improvements, are to be ascertained by Commissioners, to be appointed by the Court, and who act on oath.

These laws differ from each other only in degree; in principle they are the same. They agree in depriving the rightful owner of the land of the rents and profits received by the occupant up to a certain period, the first act fixing it to the time of actual notice of the adverse claim, and the latter

act to the time of the judgment rendered against the occupant. They also agree in compelling the successful claimant to pay, to a certain extent, the assessed value of the improvements made on the land by the occupant.

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They differ in the following particulars:

1. By the former act, the improvements to be paid for must be valuable and lasting. By the latter, they need not be either.

2. By the former, the successful claimant was entitled to a deduction from the value of the improvements for all damages sustained by the land, by waste or deterioration of the soil by cultivation, *during the occupancy of the defendant.* By the latter, he is entitled to such a deduction only for the damages and waste committed *after suit brought.*

3. By the former, the claimant was bound to pay for such improvements only as were made *before notice of the adverse title;* if those made afterwards should exceed the rents and profits which afterwards accrued, then he was not liable beyond the rents and profits for the value of such improvements. By the latter, he is liable for the value of all improvements made *up to the time of the judgment,* deducting only the rents and profits accrued, and the damage and waste committed after suit brought.

4. By the former, the claimant might, if he pleased, protect himself against a judgment for the value of the improvements, by surrendering the land to his adversary, and giving bond and security to warrant the title. But he was not

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bound to do so, nor was his giving bond and security to pay the value of the improvements, a prerequisite to his obtaining possession of his land, nor was the judgment against him made a lien on the land.

By the latter act, the claimant is bound to give such bond, at the peril of losing his land; for if he fail to give it, the occupant is at liberty to keep the land, upon giving bond and security to pay the estimated value of it unimproved; and even this he may avoid, where the value of the improvements exceeds three fourths that of the land, unless the claimant will convey to the occupant his right to the land; for upon this condition alone is judgment to be rendered against the occupant for the assessed value of the land.

The only remaining provision of these acts, which is at all important, and is not comprised in the above view of them, is the mode pointed out for estimating the value of the land in its unimproved state, of the improvements, and of the rents and profits; and this is the same, or nearly so, in both: so that it may be safely affirmed, that every part of the act of 1797 is within the purview of the act of 1812; and, consequently, the former act was repealed by the repealing clause contained in the latter.

Common law as to accountability of *malæ fidei* and *bonæ fidei* possessor, for rents and profits.

In pursuing the first head of inquiry, therefore, to which this case gives rise, the Court will confine its observations to the act of 1812, and compare its provisions with the law of Virginia, as it existed on the 18th of December, 1789.

The common law of England was, at that pe-

riod, as it still is, the law of that State; and we are informed by the highest authority, that a right to land, by that law, includes the right to enter on it, when the possession is withheld from the right owner; to recover the possession by suit; to retain the possession, and to receive the issues and profits arising from it. (*Altham's case*, 8 *Co.* 299.) In *Liford's case*, (11 *Co.* 46.) it is laid down, that the regress of the disseisee revests the property in him in the fruits or profits of the land, as well those that were produced by the industry of the occupant, as those which were the natural production of the land, not only against the disseisor himself, but against his feoffee, lessee, or disseisor; "for," says the book, "the act of my disseisor may alter my action, but cannot take away my action, property, or right; so that after the regress, the disseisee may seize these fruits, though removed from the land, and the only remedy of the disseisor, in such case, is to recoup their value against the claim of damages." The doctrine laid down in this case, that the disseisee can maintain trespass only against the disseisor for the rents and profits, is, with great reason, overruled in the case of *Holcomb* v. *Rawlyns*, (*Cro. Eliz.* 540.) (See also *Bull. N. P.* 87.)

Nothing, in short, can be more clear, upon principles of law and reason, than that a law which denies to the owner of land a remedy to recover the possession of it, when withheld by any person, however innocently he may have obtained it; or to recover the profits received from it by the occupant; or which clogs his recovery of such posses-

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sion and profits, by conditions and restrictions tending to diminish the value and amount of the thing recovered, impairs his right to, and interest in, the property. If there be no remedy to recover the possession, the law necessarily presumes a want of right to it. If the remedy afforded be qualified and restrained by conditions of any kind, the right of the owner may indeed subsist, and be acknowledged, but it is impaired, and rendered insecure, according to the nature and extent of such restrictions.

A right to land essentially implies a right to the profits accruing from it, since, without the latter, the former can be of no value. Thus, a devise of the profits of land, or even a grant of them, will pass a right to the land itself. (*Shep. Touch.* 93. *Co. Litt.* 4 *b.*) "For what," says Lord Coke, in this page, "is the land, but the profits thereof."

Thus stood the common law in Virginia at the period before mentioned; and it is not pretended that there was any statute of that State less favourable to the rights of those who derived title under her than the common law. On the contrary, the act respecting writs of right declares, in express terms, that "if the demandant recover his seisin, he may recover damages to be assessed by the recognitors of assize, for the tenant's withholding possession of the tenement demanded;" which damages could be nothing else but the rents and profits of the land. (2 vol. *Last Revisal*, p. 463.) This provision of the act was rendered necessary on account of the intended repeal of all the British statutes, and the denial of damages by the com-

mon law in all real actions, except in assize, which was considered as a mixed action. (*Co. Litt.* 257.) But in trespass *quare clausum fregit*, damages were always given at common law. (10 *Co.* 116.) And that the successful claimant of land in Virginia, who recovers in ejectment, was at all times entitled to recover rents and profits in an action of trespass, was not, and could not, be questioned by the counsel for the tenant in this case.

Rule of Equity as to accountability for rents and profits.

If, then, such was the common and statute law of Virginia, in 1789, it only remains to inquire, whether any principle of equity was recognised by the Courts of that State, which exempted the occupant of land from the payment of rents and profits to the real owner, who has successfully established his right to the land, either in a Court of law or of Equity? No decision of the Courts of that State was cited, or is recollected, which in the remotest degree sanctions such a principle.

The case of *Southall* v. *M'Kean*, which was much relied upon by the counsel for the tenant, relates altogether to the subject of *improvements*, and decides no more than this: that if the *equitable* owner of land, who is conusant of his right to it, will stand by, and see another occupy and improve the property, without asserting his right to it, he shall not, in equity, enrich himself by the loss of another, which it was in his power to have prevented, but must be satisfied to recover the value of the land, independent of the improvements. The acquiescence of the owner in the adverse possession of a person who he found engaged in making valuable improvements on the

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property, was little short of a fraud, and justified the occupant in the conclusion, that the equitable claim which the owner asserted, had been abandoned. How different is the principle of this case from that which governs the same subject by the act under consideration. By this, the principle is applicable to all cases, whether at law or in equity—whether the claimant knew or did not know of his rights, and of the improvements which were making on the land, and even after he had asserted his right by suit.

The rule of the English Court of Chancery, as laid down in 1 *Madd. Chanc.* 72. is fully supported by the authorities to which he refers. It is, that equity allows an account of rents and profits in all cases, from the time of the title accrued, provided that do not exceed six years, unless under special circumstances; as where the defendant had no notice of the plaintiff's title, nor had the deeds and writings in his custody, in which the plaintiff's title appeared; or where there has been laches in the plaintiff in not asserting his title; or where the plaintiff's title appeared by deeds in a stranger's custody; in all which cases, and others similar to them in principle, the account is confined to the time of filing the bill. The language of Lord Hardwicke, in *Dormer* v. *Fortescue*, (3 *Atk.* 128.) which was the case of an infant plaintiff, is remarkably strong. "Nothing," he observes, "can be clearer, both in law and equity, and from natural justice, than that the plaintiff is entitled to the rents and profits from the time when his title accrued." His lordship afterwards adds, that

" where the title of the plaintiff is purely equitable, that Court allows the account of rents and profits from the time the title accrued, unless under special circumstances, such as have been referred to "

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Nor is it understood by the Court, that the principles of the act under consideration can be vindicated by the doctrines of the civil law, admitting, which we do not, that those doctrines were recognised by the laws of Virginia, or by the decisions of her Courts.

Rule of the Civil law.

The exemption of the occupant, by that law, from an account for profits, is strictly confined to the case of a *bonæ fidei* possessor, who not only *supposes* himself to be the true proprietor of the land, but who is ignorant that his title is contested by some other person claiming a better right to it. Most unquestionably, this character cannot be maintained, for a moment, after the occupant has notice of an adverse claim, especially, if that be followed up by a suit to recover the possession. After this, he becomes a *malæ fidei* possessor, and holds at his peril, and is liable to restore all the mesne profits, together with the land. (*Just.* Lib. 2. tit. 1. s. 35.)

There is another material difference between the civil law and the provisions of this act, altogether favourable to the right of the successful claimant. By the former, the occupant is entitled only to those fruits or profits of the land which were produced by his own industry, and not even to those, unless they were consumed ; if they were realized, and contributed to enrich the occupant.

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he is accountable for them to the real owner, as he is for all the natural fruits of the land. (See *Just.* the sect. before quoted. *Lord Kaimes*, B. 2. c. 1. p. 411. *et seq.*) *Puffendorf*, indeed, (B. 4. c. 7. s. 3.) lays it down in broad and general terms, that fruits of industry, as well as those of nature, belong to him who is master of the thing from which they flow.

By the act in question, the occupant is not accountable for profits, from whatever source they may have been drawn, or however they may have been employed, which were received by him prior to the judgment of eviction.

But even these doctrines of the civil law, so much more favourable to the rights of the true owner of the land than the act under consideration, are not recognised by the common law of England. Whoever takes and holds the possession of land to which another has a better title, whether by disseisin, or under a grant from the disseisor, is liable to the true owner for the profits which he has received, of whatever nature they may be, and whether consumed by him or not; and the owner may even seize them, although removed from the land, as has already been shown by *Liford's case.*

We are not aware of any common law case which recognises the distinction between a *bonæ fidei* possessor, and one who holds *mala fide*, in relation to the subject of rents and profits; and we understand *Liford's case*, as fully proving, that the right of the true owner to the mesne profits, is equally valid against both. How far this distinc-

tion is noticed in a Court of equity has already been shown.

Upon the whole, then, we take it to be perfectly clear, that, according to the common law, the statute law of Virginia, the principles of equity, and even those of the civil law, the successful claimant of land is entitled to an account of the mesne profits received by the occupant from some period prior to the judgment of eviction, or decree. In a real action, as this is, no restriction whatever is imposed by the law of Virginia upon the recognitors, in assessing the damages for the demandant, except that they should be commensurate with the withholding of the possession.

If this act of Kentucky renders the rights of claimants to lands, under Virginia, less valid and secure than they were under the laws of Virginia, by depriving them of the fruits of their land, during its occupation by another, its provisions, in regard to the value of the improvements put upon the land by the occupant, can, with still less reason, be vindicated. It is not alleged by any person, that such a claim was ever sanctioned by any law of Virginia, or by her Courts of justice. The case of *Southall* v. *M'Kean*, has already been noticed and commented upon. It is laid down, we admit, in *Coulter's case*, (5 *Co.* 30.) that the disseisor, upon a recovery against him, may recoup the damages to the value of all that he has expended in amending the houses. (See, also, *Bro.* tit. *Damages*, pl. 82., who cites 24 *Edw.* III. 50.) If any common law decision has ever gone beyond the principle here laid down, we

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have not been fortunate enough to meet with it. The doctrine of *Coulter's case* is not dissimilar in principle from that which Lord Kaimes considers to be the law of nature. His words are, "it is a maxim suggested by nature, that reparations and meliorations bestowed upon a house, or on land, ought to be defrayed out of the rents. By this maxim we sustain no claim against the proprietor for meliorations, if the expense exceed not the rents levied by the *bonæ fidei* possessor." He cites *Papinian*, L. 48., *de rei vindicatione.*

Taking it for granted, that the rule, as laid down in *Coulter's case,* would be recognised as good law by the Courts of Virginia, let us see in what respects it differs from the act of Kentucky. That rule is, that meliorations of the property, (which, necessarily, mean valuable and lasting improvements,) made at the expense of the occupant of the land, shall be set off against the legal claim of the proprietor for profits which have accrued to the occupant during his possession. But, by the act, the occupant is entitled to the value of the improvements, to whatever extent they may exceed that of the profits; not on the ground of set-off against the profits, but as a substantive demand. For the account for improvements is carried down to the day of the judgment, although the occupant was for a great part of the time a *malæ fidei* possessor, against whom no more can be off-set, but the rents and profits accrued *after suit brought.* Thus, it may happen, that the occupant, who may have enriched himself to any amount, by the natural, as well as the industrial

products of land, to which he had no legal title, (as by the sale of timber, coal, ore, or the like,) is accountable for no part of those profits but such as accrued after suit brought; and, on the other hand, may demand full remuneration for all the improvements made upon the land, although they were placed there by means of those very profits, in violation of that maxim of equity, and of natural law, *nemo debet locupletari aliena jactura.*

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If the principle which this law asserts, has a precedent to warrant it, we can truly say, that we have not met with it. But we feel the fullest confidence in saying, that it is not to be found in the laws of Virginia, or in the decisions of her Courts.

But the act goes further than merely giving to the occupant a substantive claim against the owner of the land for the value of the improvements, beyond that of the profits received since the suit brought. It creates a binding lien on the land for the value of the improvements, and transfers the right of the successful claimant in the land to the occupant, who appears, judicially, to have no title to it, unless the former will give security to pay such value within a stipulated period. In other words, the claimant is permitted to purchase his own land, by paying to the occupant whatever sum the Commissioners may estimate the improvements at, whether valuable and lasting, or worthless and unserviceable to the owner, although they were made with the money justly and legally belonging to the owner; and upon these terms only, can he recover possession of his land.

If the law of Virginia has been correctly stated,

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need it be asked, whether the right and interest of such a claimant is as valid and secure under this act, as it was under the laws of Virginia, by which, and by which alone, they were to be determined? We think this can hardly be asserted. If the article of the compact, applicable to this case, meant any thing, the claimant of land under Virginia had a right to appear in a Kentucky Court, as he might have done in a Virginia Court if the separation had not taken place, and to demand a trial of his right by the same principles of law which would have governed his case in the latter State. What those principles are, have already been shown.

If the act in question does not render the right of the true owner less valid and secure than it was under the laws of Virginia, then an act declaring, that no occupant should be evicted but upon the terms of his being paid the value, or double the value of the land, by the successful claimant, would not be chargeable with that consequence, since it cannot be denied, but that the principle of both laws would be the same.

The objection to a law, on the ground of its impairing the obligation of a contract, can never depend upon the extent of the change which the law effects in it. Any deviation from its terms, by postponing, or accelerating, the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are, however minute, or apparently immaterial, in their effect upon the contract of the parties, impairs its obligation.

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Upon this principle it is, that if a creditor agree with his debtor to postpone the day of payment, or in any other way to change the terms of the contract, without the consent of the surety, the latter is discharged, although the change was for his advantage.

2. The only remaining question is, whether this act of 1812 is repugnant to the constitution of the United States, and can be declared void by this Court, or by the Circuit Court from which this case comes by adjournment?

But, previous to the investigation of this question, it will be proper to relieve the case from some preliminary objections to the validity and construction of the compact itself.

1st. It was contended by the counsel for the tenant, that the compact was invalid *in toto*, because it was not made in conformity with the provisions of the constitution of the United States; and, if not invalid to that extent, still, 2dly. The clause of it applicable to the point in controversy, was so, inasmuch as it surrenders, according to the construction given to it by the opposite counsel, rights of sovereignty which are unalienable.

The compact of 1789 is valid, as having been made with the assent of Congress.

1. The first objection is founded upon the allegation, that the compact was made without the consent of Congress, contrary to the tenth section of the first article, which declares, that "no State shall, without the consent of Congress, enter into any agreement or compact with another State, or with a foreign power." Let it be observed, in the first place, that the constitution makes no provision respecting the mode or form in which the consent

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of Congress is to be signified, very properly leaving that matter to the wisdom of that body, to be decided upon according to the ordinary rules of law, and of right reason. The only question in cases which involve that point is, has Congress, by some positive act, in relation to such agreement, signified the consent of that body to its validity? Now, how stands the present case? The compact was entered into between Virginia and the people of Kentucky, upon the express condition, that the general government should, prior to a certain day, assent to the erection of the District of Kentucky into an independent State, and agree, that the proposed State should immediately, after a certain day, or at some convenient time future thereto, be admitted into the federal Union. On the 28th of July, 1790, the convention of that District assembled, under the provisions of the law of Virginia, and declared its assent to the terms and conditions prescribed by the proposed compact; and that the same was accepted as a solemn compact, and that the said District should become a separate State on the 1st of June, 1792. These resolutions, accompanied by a memorial from the convention, being communicated by the President of the United States to Congress, a report was made by a committee, to whom the subject was referred, setting forth the agreement of Virginia, that Kentucky should be erected into a State, *upon certain terms and conditions*, and the acceptance by Kentucky *upon the terms and conditions so prescribed;* and, on the 4th of February, 1791, Congress passed an act, which, after referring to

the compact, and the acceptance of it by Kentucky, declares the consent of that body to the erecting of the said District into a separate and independent State, upon a certain day, and receiving her into the Union.

Now, it is perfectly clear, that, although Congress might have refused their consent to the proposed separation, yet they had no authority to declare Kentucky a separate and independent State, without the assent of Virginia, or upon terms variant from those which Virginia had prescribed. But Congress, after recognising the conditions upon which alone Virginia agreed to the separation, expressed, by a solemn act, the consent of that body to the separation. The terms and conditions, then, on which alone the separation could take place, or the act of Congress become a valid one, were necessarily assented to; not by a mere tacit acquiescence, but by an express declaration of the legislative mind, resulting from the manifest construction of the act itself. To deny this, is to deny the validity of the act of Congress, without which, Kentucky could not have become an independent State; and then it would follow, that she is at this moment a part of the State of Virginia, and all her laws are acts of usurpation. The counsel who urged this argument, would not, we are persuaded, consent to this conclusion; and yet it would seem to be inevitable, if the premises insisted upon be true.

2. The next objection, which is to the validity of the particular clause of the compact involved in this controversy, rests upon a principle, the cor-

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rectness of which remains to be proved. It is practically opposed by the theory of all limited governments, and especially of those which constitute this Union. The powers of legislation granted to the government of the United States, as well as to the several State governments, by their respective constitutions, are all limited. The article of the constitution of the United States, involved in this very case, is one, amongst many others, of the restrictions alluded to. If it be answered, that these limitations were imposed by the people in their sovereign character, it may be asked, was not the acceptance of the compact the act of the people of Kentucky in their sovereign character? If, then, the principle contended for be a sound one, we can only say, that it is one of a most alarming nature, but which, it is believed, cannot be seriously entertained by any American statesman or jurist.

The compact not invalid upon the ground of its surrendering sovereign rights.

Various objections were made to the literal construction of the compact, one only of which we deem it necessary particularly to notice. That was, that if it be so construed as to deny to the legislature of Kentucky the right to pass the act in question, it will follow, that that State cannot pass laws to affect lands, the title to which was derived under Virginia, although the same should be wanted for public use. If such a consequence grows necessarily out of this provision of the compact, still we can perceive no reason why the assent to it by the people of Kentucky should not be binding on the legislature of that State. Nor can we perceive, why the admission of the con-

clusion involved in the argument should invalidate an express article of the compact in relation to a quite different subject. The agreement, that the rights of claimants under Virginia should remain as valid and secure as they were under the laws of that State, contains a plain, intelligible proposition, about the meaning of which, it is impossible there can be two opinions. Can the government of Kentucky fly from this agreement, acceded to by the people in their sovereign capacity, because it involves a principle which might be inconvenient, or even pernicious to the State, in some other respect? The Court cannot perceive how this proposition could be maintained.

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But the fact is, that the consequence drawn by counsel from a literal construction of this article of the compact, cannot be fairly deduced from the premises, because, by the common law of Virginia, if not by the universal law of all free governments, private property may be taken for public use, upon making to the individual a just compensation. The admission of this principle never has been imagined by any person as rendering his right to property less valid and secure than it would be were it excluded; and, consequently, it would be an unnatural and forced construction of this article of the compact, to say, that it included such a case.

We pass over the other observations of counsel upon the construction of this article, with the following remark: that where the words of a law, treaty, or contract, have a plain and obvious meaning, all construction, in hostility with such mean-

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ing, is excluded. This is a maxim of law, and a dictate of common sense; for were a different rule to be admitted, no man, however cautious and intelligent, could safely estimate the extent of his engagements, or rest upon his own understanding of a law, until a judicial construction of those instruments had been obtained.

We now come to the consideration of the question, whether this Court has authority to declare the act in question unconstitutional and void, upon the ground, that it impairs the obligation of the compact? This is denied for the following reasons: It is insisted, in the first place, that this Court has no such authority, where the objection to the validity of the law is founded upon its opposition to the constitution of Kentucky, as it was, in part, in this case. It will be a sufficient answer to this observation, that our opinion is founded exclusively upon the constitution of the United States.

The jurisdiction of this Court, in the present case, not excluded by the tribunal of the compact.

2dly. It was objected, that Virginia and Kentucky, having fixed upon a tribunal to determine the meaning of the compact, the jurisdiction of this Court is excluded. If this be so, it must be admitted, that all controversies which involve a construction of the compact, are equally excluded from the jurisdiction of the *State Courts* of Virginia and Kentucky. How, then, are those controversies, which we were informed by the counsel on both sides crowded the Federal and State Courts of Kentucky, to be settled? The answer, we presume, would be, by Commissioners, to be appointed by those States. But none such have

been appointed; what then? Suppose either of those States, Virginia for example, should refuse to appoint Commissioners? Are the occupants of lands, to which they have no title, to retain their possessions until this tribunal is appointed, and to enrich themselves, in the mean time, by the profits of them, not only to the injury of non-residents, but of the citizens of Kentucky? The supposition of such a state of things is too monstrous to be for a moment entertained. The best feelings of our nature revolt against a construction which leads to it.

But how happens it that the questions submitted to this Court have been entertained, and decided, by the Courts of Kentucky, for twenty-five years, as we were informed by the counsel? Have these Courts, cautious and learned as they must be acknowledged to be, committed the crime of usurping a jurisdiction which did not belong to them? We should feel very unwilling to come to such a conclusion.

The answer, in a few words, to the whole of the argument, is to be found in the explicit language of that provision of the compact, which respects the tribunal of the Commissioners. It is to be appointed in no case but where a complaint, or dispute shall arise, not between *individuals*, but between *the Commonwealth of Virginia and the State of Kentucky, in their high sovereign characters.*

Having thus endeavoured to clear the question of these preliminary objections, we have only to add, by way of conclusion, that the duty, not less

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than the power of this Court, as well as of every other Court in the Union, to declare a law unconstitutional, which impairs the obligation of contracts, whoever may be the parties to them, is too clearly enjoined by the constitution itself, and too firmly established by the decisions of this and other Courts, to be now shaken; and that those decisions entirely cover the present case.

A compact between two States is a *contract* within the constitutional prohibition.

A slight effort to prove that a *compact* between two States is not a case within the meaning of the constitution, which speaks of *contracts*, was made by the counsel for the tenant, but was not much pressed. If we attend to the definition of a contract, which is the agreement of two or more parties, to do, or not to do, certain acts, it must be obvious, that the propositions offered, and agreed to by Virginia, being accepted and ratified by Kentucky, is a contract. In fact, the terms compact and contract are synonymous: and in *Fletcher* v. *Peck*, the Chief Justice defines a *contract* to be a *compact* between two or more parties. The principles laid down in that case are, that the constitution of the United States embraces all contracts, executed or executory, whether between individuals, or between a State and individuals; and that a State has no more power to impair an obligation into which she herself has entered, than she can the contracts of individuals. Kentucky, therefore, being a party to the compact which guarantied to claimants of land lying in that State, under titles derived from Virginia, their rights, as they existed under the laws of Virginia, was incompetent to violate that contract, by pass-

ing any law which rendered those rights less valid and secure.

It was said, by the counsel for the tenant, that the validity of the above laws of Kentucky, have been maintained by an unvarying series of decisions of the Courts of that State, and by the opinions and declarations of the other branches of her government. Not having had an opportunity of examining the reported cases of the Kentucky Courts, we do not feel ourselves at liberty to admit or deny the first part of this assertion. We may be permitted, however, to observe, that the principles decided by the Court of Appeals of that State, in the cases of *Haye's Heirs* v. *M'Murray*, a manuscript report of which was handed to the Court when this cause was argued, are in strict conformity with this opinion. As to the other branches of the government of that State, we need only observe, that whilst the legislature has maintained the opinion, most honestly we believe, that the acts of 1797, and 1812, were consistent with the compact, the objections of the Governor to the validity of the latter act, and the reasons assigned by him in their support taken in connexion with the above case, incline us strongly to suspect, that a great diversity of opinion prevails in that State, upon the question we have been examining. However this may be, we hold ourselves answerable to God, our consciences, and our country, to decide this question according to the dictates of our best judgment, be the consequences of the decision what they may. If we have ventured to entertain a wish as to the result of the investigation which

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we have laboriously given to the case, it was, that it might be favourable to the validity of the laws; our feelings being always on that side of the question, unless the objections to them are fairly and clearly made out.

The above is the opinion of a majority of the Court.

The opinion given upon the first question proposed by the Circuit Court, renders it unnecessary to notice the second question.

Mr. Justice JOHNSON. Whoever will candidly weigh the intrinsic difficulties which this case presents, must acknowledge, that the questions certified to this Court, are among those on which any two minds may differ, without incurring the imputation of wilful, or precipitate error.

We are fortunate, in this instance, in being placed aloof from that unavoidable jealousy which awaits decisions founded on appeals from the exercise of State jurisdiction. This suit was originally instituted in the Circuit Court of the United States; and the duty now imposed upon us is, to decide, according to the best judgment we can form, on the law of Kentucky. We sit, and adjudicate, in the present instance, in the capacity of Judges of that State. I am bound to decide according to those principles which ought to govern the Courts of that State when adjudicating between its own citizens.

The first of the two questions certified to this Court is, whether the laws, well known by the

description of the occupying claimant laws of Kentucky, are constitutional?

The laws known by that denomination are the acts passed the 27th of February, 1797, and the 31st of January, 1812. The general purport of the former is, to give to a defendant in ejectment, compensation for actual improvements innocently made upon the land of another. The practical effect of the latter, is to give him compensation for all the labour and expense bestowed upon it, whether productive of improvement or not.

The two acts differ as to the time from which damages and rents are to be estimated, but concur,

1st. In enjoining on the Courts the substitution of Commissioners, for a jury, in assessing damages.

2dly. In converting the plaintiff's right to a judgment, after having established his right to land, from an absolute, into a conditional right; and,

3dly. Under some circumstances, in requiring, that judgment should be given for the defendant, and that the plaintiff, in lieu of land, should recover an assessed sum of money, or, rather, bonds to pay that sum, i. e. another right of action, if any thing.

The second question certified is, on which of these two acts the Court shall give judgment, and seems to have arisen out of an argument insisted on at the trial, that as the suit was instituted prior to the passage of the last act, it ought to be adjudicated under the first act, notwithstanding that the act of 1812 was in force when judgment was given.

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As the language of the first question is sufficiently general to embrace all questions that may arise, either under the State, or United States' constitution, much of the argument before this Court turned upon the inquiry, whether the rights of the parties were affected by that article of the United States' constitution which makes provision against the violation of contracts?

The general question I shall decline passing an opinion upon. I consider such an inquiry as a work of supererogation, until the benefit of that provision in the constitution shall be claimed, in an appeal from the decision of a Court of the State. There is, however, one view of this point, presented by one of the gentlemen who appeared on behalf of the State, which cannot pass unnoticed. It was contended, that the constitution of Kentucky, in recognising the compact with Virginia, recognises it only as a compact; and, therefore, that it acquires no more force under that constitution, than it had before; and that but for the constitution of Kentucky, questions arising under it were of mere diplomatic cognizance; and were not, by the constitution, transmuted into subjects of judicial cognizance.

I am constrained to entertain a different view of this subject; and, without passing an opinion on the legal effect of the compact, in its separate existence, upon individual rights, I must adopt the opinion, that when the people of Kentucky declared, that "the compact with the State of Virginia, subject to such alterations as may be made therein, agreeably to the mode prescribed by the

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said compact, shall be considered as part of this constitution," they enacted it as *a law* for themselves, in all those parts in which it was previously obligatory on them as *a contract;* and made it a fundamental law, one which could only be repealed in the mode prescribed for altering that constitution. Had it been enacted in the ordinary form of legislation, notwithstanding the absurdity insisted on of enacting laws obligatory on Virginia, it is certain, that the maxim, *utile per inutile non vitiatur*, would have been applied to it, and it would have been enforced as a law of Kentucky in every Court of justice setting in judgment upon Kentucky rights. How much more so, when the people thought proper to give it the force and solemnity of a fundamental law.

I therefore consider the article of the compact which has relation to this question, as operating on the rights and interests of the parties, with the force of a fundamental law of the State; and, certainly, it can, then, need no support from viewing it as a contract, unless it be, that the constitution may be repealed by one of the parties, but the contract cannot. While the constitution continues unrepealed, it is putting a fifth wheel to the carriage to invoke the contract into this cause. It can only eventuate in crowding our dockets with appeals from the State Courts.

I consider, therefore, the following extract from the compact, as an enacted law of Kentucky: "That all private rights and interests of lands within (Kentucky,) derived from the laws of Virginia prior to (*their*) separation, shall remain valid

1823. and secure under the laws of the proposed State, and shall be determined by the laws (*existing in Virginia at the time of the separation.*") The alterations here made in the phraseology, are such as necessarily result from the adaptation of it to a legislative form. The occupying claimant laws, therefore, must conform to this constitutional provision, or be void; for a legislature, constituted under that constitution, can exercise no powers inconsistent with the instrument which created it. The will of the people has decreed otherwise, and the interests of the individual cannot be affected by the exercise of powers which the people have forbidden their legislature to exercise.

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To constitute the sovereign and independent State of Kentucky was, unquestionably, the leading object of the act of Virginia of the 18th of December, 1789. To exercise unlimited legislative power over the territory within her own limits, is one of the essential attributes of that sovereignty; and every restraint in the exercise of this power, I consider as a restriction on the intended grant, and subject to a rigorous construction. On general principles, private property would have remained unaffected by the transfer of sovereignty; but thenceforth would have continued subject, both as to right and remedy, to the legislative power of the State newly created. The argument for the plaintiff is, that the provision now under consideration goes beyond the recognition or enforcement of this principle, and restrains the State of Kentucky from any legislative act that can in any way impair or encumber, or vary the beneficiary inte-

rests which the grantees of land acquired under the laws of Virginia. Or, in other words, that it creates a peculiar tenure on the lands granted by Virginia, which exempts them from that extent of legislative action to which the residue of the State is unquestionably subjected. It must mean this, if it means any thing. For, supposing all the grantees of lands, under the laws of Virginia, in actual possession of their respective premises, unless the lands thus reduced into possession be still under the supposed protection of this compact, neither could they have been at any time previous. The words of the compact, if they carry the immunity contended for beyond the period of separation, are equally operative to continue it ever after.

But where would this land us? If the State of Kentucky had, by law, enacted, that the dower of a widow should extend to a life estate in one half of her husband's land, would the widow of a Virginian, whose husband died the day after, have lost the benefit of this law, because the laws of Virginia had given the wife an inchoate right in but one third? This would be cutting deep, indeed, into the sovereign powers of Kentucky, and would be establishing the anomaly of a territory over which no government could legislate; not Virginia, for she had parted with the sovereignty; not Kentucky, for the laws of Virginia were irrevocably fastened upon two thirds of her territory.

But, it is contended, that the clause of the compact under consideration, must have meant more

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than what is implied in every cession of territory, or it was nugatory to have inserted it.

I confess, I cannot discover the force of this argument. In the present case it admits of two answers; the one is found in the very peculiar nature of the land titles created by Virginia, and then floating over the State of Kentucky. Land they were not, and yet all the attributes of real estate were extended to them, and intended by the compact to be preserved to them under the dominion of the new State. There was, then, something more than the ordinary rights of individuals in the ceded territory to be perpetuated, and enough to justify the insertion of such a provision as a necessary measure. But, there is another answer to be found, in the ordinary practice of nations in their treaties, in which, from abundant caution, or, perhaps, diplomatic parade, many stipulations are inserted for the preservation of rights which no civilian would suppose could be affected by a change of sovereignty. Witness the frequent stipulations for the restoration of wrecked goods, or goods piratically taken; witness, also, the third article of the treaty ceding Louisiana, and the sixth article of that ceding Florida, both of which are intended to secure to the inhabitants of the ceded territory, rights which, under our civil institutions, could not be withheld from them.

But, let us now reverse the picture, and inquire whether this stipulation of the compact, or of the constitution, prescribed no limits to the legislative power of Kentucky over the ceded territory. Had the State of Kentucky, immediately after it was or-

ganized, passed a law, declaring, that wherever a plaintiff in ejectment, or in a writ of right, shall have established his right in law to recover, the jury shall value the premises claimed, and, instead of judgment for the land, and the writ of possession, the plaintiff shall have his judgment for the value so assessed, and the ordinary process of law to recover a sum of money on judgment; who is there who would not have felt that this was a mere mockery of the compact, a violation of the first principles of private right, and of faith in contracts? Yet such a law is, in degree, not in principle, variant from the occupying claimant laws under consideration, and the same latitude of legislative power which will justify the one, would justify the other.

But, again, on the other hand, (and I acknowledge that I am groping my way through a labyrinth, trying to lay hold of sensible objects to guide me,) who can doubt, that where private property had been wanted for national purposes, the legislature of Kentucky might have compelled the individual to convey it for a value tendered, notwithstanding it was held under a grant from Virginia, and notwithstanding such a violation of private right had been even constitutionally forbidden by the State of Virginia? Or who can doubt the power of Kentucky to regulate the course of descents, the forms of conveying, the power of devising, the nature and extent of liens, within her territorial limits? For example: By the civil law, the workman who erects an edifice, acquires a lien on both the building and the land it stands upon,

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for payment of his bill. Why should not the State of Kentucky have adopted this wise and just principle into her jurisprudence? Or why not have extended it to the case of the labourer who clears a field? Yet, in principle, the occupying claimant laws, at least that of 1797, was really intended to engraft this very provision into the Kentucky code, as to the innocent improver of another man's property. It was thought, and justly thought, that as the State of Virginia had pursued a course of legislation in settling the country, which had introduced such a state of confusion in the titles to landed property, as rendered it impossible for her to guaranty any specific tract to the individual, it was but fair and right that some security should be held out to him for the labour and expense bestowed in improving the country; and that where the successful claimant recovered his land, enhanced in value by the labours of another, it was but right that he should make compensation for the enhanced value. To secure this benefit to the occupying claimant, to give a lien upon the land for his indemnity, and avoid the necessity of a suit in equity, were, in fact, the sole objects of the act of 1797. The misfortune of this system appears to have been, that to curtail litigation, by providing the means of closing this account current of rights and liabilities in a Court of law, and in a single suit, so as to obviate the necessity of going into equity; or of an action for mesne profits on the one side, and an action for compensation on the other, appears to have absorbed the attention of the legislature. The consequence of

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which is, that a course of proceeding, quite inconsistent with the simplicity of the common law process, and a curious debit and credit of land, damages and mesne profits on the one hand, and of *quantum meruit* on the other, has been adopted, exhibiting an anomaly well calculated to alarm the precise notions of the common law.

But suppose, that instead of imposing this complex mode of coming at the end proposed, the legislature of Kentucky had passed a law simply declaring, that the innocent improver of lands, without notice, should have his action to recover indemnity for his improvements, and a lien on the premises so improved, in preference to all other creditors: I can see no principle on which such a law could be declared unconstitutional; nor any thing that is to prevent the party from enforcing it in any Court having competent jurisdiction.

But the inconsistency which strikes every one in considering the laws as they now stand is, that one party should have a verdict, and another, finally, the judgment. That, *eodem flatu*, the plaintiff should be declared entitled to recover land, and yet not entitled to recover land.

After thus mooting the difficulties of this case, I am led to the opinion, that if we depart from the restricted construction of the article under consideration, we are left to float on a sea of uncertainty as to the extent of the legislative power of Kentucky over the territory held under Virginia grants; that if, obliged to elect between the assumed exercise, and the utter extinction of the power of Kentucky over the subject, I would

1823. adopt the former; that every question between those extremes, is one of expediency or diplomacy, rather than of judicial cognizance, and not to be decided before this tribunal. If compelled to decide on the constitutionality of these laws, strictly speaking, I would say, that they in no wise impugn the force of the laws of Virginia, under which the titles of landholders are derived, but operate to enforce a right acquired subsequently, and capable of existing consistently with those acquired under the laws of Virginia. I cannot admit, that it was ever the intention of the framers of this constitution, or of the parties to this compact, or of the United States, in sanctioning that compact, that Kentucky should be for ever chained down to a state of hopeless imbecility—embarrassed with a thousand minute discriminations drawn from the common law, refinements on mesne profits, set-offs, &c., appropriate to a state of society, and a state of property, having no analogy whatever to the actual state of things in Kentucky —and yet, no power on earth existing to repeal or to alter, or to effect those accommodations to the ever varying state of human things, which the necessities or improvements of society may require. If any thing more was intended than the preservation of that very peculiar and complex system of land laws then operating over that country, under the laws of Virginia, it would not have extended beyond the maintenance of those great leading principles of the fundamental laws of that State, which, as far as they limited the legislative power of the State of Virginia over the rights of

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individuals, became, also, blended with the law of the land, then about to pass under a new sovereignty. And if it be admitted, that the State of Kentucky might, in any one instance, have legislated as far as the State of Virginia might have legislated on the same subject, I acknowledge that I cannot perceive where the line is to be drawn, so as to exclude the powers asserted under, at least, the first of the laws now under consideration. But, it appears to me, that this cause ought to be decided upon another view of the subject.

The practice of the Courts of the United States, that is, the remedy of parties therein, is subject to no other power than that of Congress. By the act of 1789, the practice of the respective State Courts was adopted into the Courts of the United States, with power to the respective Courts, and to the Supreme Court, to make all necessary alterations. Whatever changes the practice of the respective States may have undergone since that time, that of the United States Courts has continued uniform; except so far as the respective Courts have thought it advisable to adopt the changes introduced by the State legislatures.

The District of Kentucky was established while it was yet a part of Virginia. (*Judiciary Act, September* 24, 1789.) The practice of the State of Virginia, therefore, was made the practice of the United States Courts in Kentucky. Now, according to the practice of Virginia, the plaintiff, here, upon making out his title, ought to have had a verdict and judgment in the usual form. Nor can I recognise the right of the State of Ken-

1823. tucky to compel him, or to compel the Courts of the United States, to pass through this subsequent process before a Board of Commissioners, and, afterwards, to purchase his judgment in the mode prescribed by the State laws. I do not deny the right of the State to give the lien, and to give the action for improvements; but I do deny the right to lay the Courts of the United States under an obligation to withhold from a plaintiff the judgment to which, under the established practice of that Court, he had entitled himself.

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It may be argued, that the Courts of the United States, in Kentucky, have long acquiesced in a compliance with these laws, and thereby have adopted this course of proceeding into their own practice. This, I admit, is correct reasoning; for the Court possessed the power of making rules of practice; and such rules may be adopted by habit, as well as by framing a literal rule. But the facts, with regard to the Circuit Court here, could only sustain the argument as to the occupying claimant law of 1797, since that of 1812 appears to have been early resisted. Here, however, I am led to an inquiry which will equally affect the validity of both laws, viewed as rules of practice; as affecting a fundamental right, incident to remedies in our Courts of law.

It is, obviously, a leading object of these laws, to substitute a trial by a Board of Commissioners, for the trial by jury, as to mesne profits, damages, and a *quantum meruit*. Without examining how far the legislative power of Kentucky is adequate

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to this change in its own Courts, I am perfectly satisfied, that it cannot be introduced by State authority into the Courts of the United States. And I go farther: the Judges of these Courts have not power to make the change; for the constitution has too sedulously guarded the trial by jury; (*seventh article of Amendments;*) and the judiciary act of the United States both recognises the separation between common law and equity proceedings, and forbids that any Court should blend and confound them.

These considerations lead me to the conclusion, that the defendant is not entitled to judgment under either of the acts under consideration, even admitting them to be constitutional; but if, under either, certainly under that alone which has been adopted into the practice of the United States Courts in Kentucky.

CERTIFICATE. This cause came on to be heard on the transcript of the record of the Circuit Court of the United States for the District of Kentucky, on certain questions upon which the opinions of the Judges of the said Circuit Court were opposed, and which were certified to this Court for their decision by the Judges of the said Circuit Court, and was argued by counsel. On consideration whereof, it is the opinion of this Court, that the act of the said State of Kentucky, of the 27th of February, 1797, concerning occupying claimants of land, whilst it was in force, was repugnant to the constitution of the United

1823. States, but that the same was repealed by the act of the 31st of January, 1812, to amend the said act; and that the act last mentioned is also repugnant to the constitution of the United States.

La Nereyda.

The opinion given on the first question submitted to this Court by the said Circuit Court, renders it unnecessary to notice the second question.

All which is ordered to be certified to the said Circuit Court.

[PRIZE. CONCLUSIVENESS OF SENTENCE.]

LA NEREYDA. *The Spanish Consul*, Libellant.

Quære, Whether a regular sentence of condemnation in a Court of the captor, or his ally, the captured property having been carried *infra præsidia*, will preclude the Courts of this country from restoring it to the original owners, where the capture was made in violation of our laws, treaties, and neutral obligations?

Whoever claims under such a condemnation, must show, that he is a *bona fidei* purchaser for a valuable consideration, unaffected with any participation in the violation of our neutrality by the captors.

Whoever sets up a title under any condemnation, as prize, is bound to produce the libel, or other equivalent proceeding, under which the condemnation was pronounced, as well as the sentence of condemnation itself.

Where an order for farther proof is made, and the party disobeys, or neglects to comply with its injunctions, Courts of prize generally consider such disobedience, or neglect, as fatal to his claim.

Upon such an order, it is almost the invariable practice for the claimant (besides other testimony) to make proof by his own oath of his proprietary interest, and to explain the other circumstances of the